MALAYSIA

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including

ANNEX I: Arbitration Act 2005 (Act 646) (as last amended in 2018 *vide* Act A1569)
ANNEX II: Order 69 of the Rules of Court (P.U.(A) 205/2012)
ANNEX III: Mediation Act 2012 (Act 749)
ANNEX IV: Practice Direction on Mediation (Practice Direction No. 4 of 2016)
ANNEX V: Convention on Settlement of Investment Disputes Act 1966 (Act 392)
ANNEX VI: Malaysia Model BIT (1998)

Chapter I. Introduction

1. LAW ON ARBITRATION

a. Legislation

The Malaysian Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") and the New Zealand Arbitration Act 1996. The 2005 Act applies to both domestic and international arbitrations,[1] and applies to all aspects of arbitrations in Malaysia.[2]

The 2005 Act consists of four parts. Part III, which contains provisions on, *inter alia*, appeals from arbitration awards on points of law, applies to domestic arbitrations unless the parties explicitly decide otherwise, while it does not cover international arbitrations unless the parties expressly opt in. According to Sect. 3 of the 2005 Act, parties to domestic or international arbitrations may opt-out or opt-in respectively to the whole or any part of Part III of the 2005 Act.

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1. For the distinction between domestic and international arbitrations, see Sect. 3 of the 2005 Act.
2. See Sects. 3, 5 and 8 of the 2005 Act.

The 2005 Act was amended in 2011 to address some lacunae which were identified from the courts' interpretation of certain aspects of the 2005 Act. The 2011 amendments were introduced to restrict curial intervention, streamline substantive claims before the courts and allow parties to domestic arbitrations to opt out from having the substance of their disputes decided in accordance with the substantive law of Malaysia. The 2011 amendments also specifically provide for international awards to be recognized and enforced in Malaysia and allow the courts to separate parts of the award and enforce only the parts referred to arbitration where an award contains parts which were decided to be outside the jurisdiction of the arbitral tribunal.

In 2018, the 2005 Act was amended to more closely mirror the UNCITRAL Model Law as amended in 2006 and arbitration legislation of leading arbitration jurisdictions, and to change the name of the Kuala Lumpur Regional Centre for Arbitration ("KLRCA") to the Asian International Arbitration Centre (AIAC").

b. Mandatory provisions

Parts I, II and IV of the 2005 Act are mandatory provisions which apply to all arbitrations and arbitration-related proceedings in Malaysia. Parts I and IV set out certain preliminary and miscellaneous provisions for all arbitrations in Malaysia, whereas Part II provides the bulk of the *lex arbitri* for all arbitrations and arbitration-related proceedings in Malaysia.

The procedural rules applicable to arbitration-related court proceedings in Malaysia is Order 69 of the Rules of Court 2012 (see **Annex II** hereto).

2. PRACTICE OF ARBITRATION

a. Arbitral institutes

There are several major arbitration institutions in Malaysia. Foremost amongst them is the AIAC (formerly the KLRCA),[3] which was established in 1978 under the auspices of the Asian-African Legal Consultative Organization.

The AIAC is an international organization established on 17 October 1978, under the auspices of the Asian-African Legal Consultative Organization (formerly the Asia-African Legal Consultative Committee). It is accorded immunity from suits and legal process under the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 made pursuant to Sects. 3 and 4 of the International Organizations (Privileges and Immunities) Act 1992, which was passed by the Malaysian Parliament to

3. At the time of writing, the KLRCA is in the midst of its rebranding into the AIAC, and much of KLRCA's publications make reference to the KLRCA instead of the AIAC. As such, reference to the arbitral institution formerly known as the KLRCA shall be AIAC, whereas the existing arbitration rules and publications of the AIAC will retain its reference to KLRCA.

implement the Convention on the Privileges and Immunities of the United Nations 1946.[4]

The AIAC administers arbitrations under its own rules,[5] which are the UNCITRAL arbitration rules as modified by the AIAC, as well as its other rules relating to fast-track arbitration, Islamic-compliant arbitrations, statutory adjudications and domain name dispute resolution, amongst others. The AIAC also hosts alternative venues for arbitrations administered by the Permanent Court for Arbitration, the World Bank's International Centre for Settlement of Investment Disputes and the Court of Arbitration for Sports. It carries out various initiatives for the promotion of arbitration, and collaborates with professional bodies and academic institutions to provide training in arbitration.

The AIAC's various arbitration rules allow a great degree of flexibility in the conduct of arbitration proceedings. Parties are given a wide discretion in choosing arbitrators, the venue of arbitration and the applicability of various aspects of the AIAC's arbitration rules.

Under Sect. 13 of the Arbitration Act 2005 (see **Annex I** hereto), the Director of the AIAC is designated as the appointing authority in the event of defaults in appointment or defaults in designated an appointing procedure.

The contact details of the AIAC are as follows:

Asian International Arbitration Centre
Bangunan Sulaiman
Jalan Sultan Hishamuddin
50000 Kuala Lumpur
Malaysia
Telephone: +603 2271 1000
Facsimile: +603 2271 1010
Website: < www.aiac.world>

Other arbitral institutions include the Malaysian Institute of Architects, the Institution of Engineers Malaysia, the Malaysian International Chambers of Commerce, the Kuala Lumpur and Selangor Chinese Chambers of Commerce and commodity associations such as the Malaysian Rubber Board and the Palm Oil Refiners Association of Malaysia. Their contact details are as follows:

The Malaysian Institute of Architects
99L, Jalan Tandok, Bangsar
59100 Kuala Lumpur
Malaysia
Telephone: +603 2202 2866
Facsimile: +603 2202 2566
E-mail: info@pam.org.my
Website: <www.pam.org.my>

4. See also *Regional Centre for Arbitration v. Ooi Beng Choo & Anor* [1998] 7 MLJ 193.
5. Available at <https://aiac.world/wp-content/arbitration/Arbitration-Rules-2018.pdf>.

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
Telephone: +603 7968 4001/4002
Facsimile: +603 7957 7678
E-mail: sec@iem.org.my
Website: <www.myiem.org.my/>

The Malaysian International Chambers of Commerce
C-08-08, 8th Floor
Block C, Plaza Mont' Kiara
No. 2 Jalan Kiara
Mont' Kiara
50480 Kuala Lumpur
Malaysia
Telephone: +603 6201 7708
Facsimile: +603 6201 7705
Website: <www.micci.com>

The Chinese Chamber of Commerce & Industry of Kuala Lumpur and Selangor (KLSCCCI)
7th Floor, Wisma Chinese Chamber
258 Jalan Ampang
50450 Kuala Lumpur
Malaysia
Telephone: +603 4253 2135
Facsimile: +603 4253 2524
E-mail: inquiry@chinesechamber.org.my
Website: <www.chineschamber.org.my>

Malaysian Rubber Board
18th Floor Bangunan
Getah Asli (Menara)
148 Jalan Ampang
50450 Kuala Lumpur
Malaysia
Telephone: +603 9206 2000
Facsimile: +603 2163 4492
E-mail: general@lgm.gov.my
Website: <www.lgm.gov.my/>

The Palm Oil Refiners Association of Malaysia (PORAM)
801C/802A, Block B Executive Suites
Kelana Business Centre
97, Jalan SS7/2
47301 Kelana Jaya
Selangor Darul Ehsan
Malaysia
Telephone: +603 7492 0006
Facsimile: +603 7492 0128
E-mail: info@poram.org.my
Website: <www.poram.org.my>

Royal Institution of Surveyors Malaysia
3rd Floor, Bangunan Juruukur,
64-66, Jalan 52/4,
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Selangor Darul Ehsan,
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Facsimile: (+603) 7955 0253
E-mail: secretariat@rism.org.my
Website: <www.rism.org.my>

Securities Industry Dispute Resolution Center
Unit A-9-1, Level 9, Tower A,
Menara UOA Bangsar,
No. 5, Jalan Bangsar Utama 1,
59000 Kuala Lumpur,
Malaysia
Telephone: +603 2282 2280
Facsimile: +603 2282 3855
E-mail: info@sidrec.com.my
Website: <www.sidrec.com.my>

b. Use of arbitration in domestic and international disputes

According to the KLRCA Annual Reports from 2015 to 2017, construction disputes (including disputes related to engineering, infrastructure, architecture and design, and quantity surveying) form the bulk of disputes typically arbitrated in Malaysia.[6]

Apart from the construction industry, arbitration is frequently used to resolve disputes relating to agency (dealerships, distributions and franchising), aviation and airports, banking and financial instruments, companies (shareholders, shares and equities, joint ventures, partnerships and mergers and acquisitions), concession agreements, employment and industrial relations, energy (including mining, oil and gas, power, natural resources), information

6. See <https://aiac.world/Publications->.

technology and telecommunications, intellectual property (copyrights, patents and trademarks), insurances and re-insurances, investment (commodities and treaty), maritime (admiralty, shipping, charter party, vessels, bills of lading and shipbuilding), media and broadcast (advertising, arts and entertainments), real estate (land and properties, tenancies and conveyancing), services and goods (sale, supply, trading and marketing) and sports.

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Chapter II. Arbitration Agreement

1. FORM AND CONTENTS OF THE AGREEMENT

a. Arbitration clause and submission agreement

The Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) does not distinguish between a submission agreement and an arbitration clause, mirroring Art. 7 of the Model Law. 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 goes on to provide that an arbitration agreement may be in the form of an arbitration clause or in the form of a separate agreement.

b. Form and substance requirements

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. Adoption of standard arbitration clauses provided by the respective arbitral institutions is encouraged, though parties remain free to draft original agreements, and in such circumstances it has been suggested that the following matters should be included:[7]

(1) a clear reference to arbitration;
(2) the seat of the arbitration;
(3) the governing law;
(4) applicable procedural rules;
(5) the procedure by which the arbitral tribunal is to be constituted;
(6) the qualifications and number of members of the arbitral tribunal;
(7) the mode and manner of filling vacancies;
(8) the language of the arbitral tribunal; and
(9) privacy and confidentiality.

The consequences of a lack of care in drafting arbitration clauses with clarity and certainty has been the subject of litigation in a number of cases in Malaysia. For example, in *Innotec Asia Pacific Sdn Bhd v. Innotec GhBH,*[8] 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 the term "SIHK" referred to in the various agreements could mean many different

7. See *The Arbitration Act 2005: UNCITRAL Model Law as Applied in Malaysia* (Sweet & Maxwell Asia 2007), at pp. 40-46.
8. [2007] 8 CLJ 304.

institutions and hence there was a serious question as to the venue of the arbitration. The High Court found that "SIHK" referred to *Südwestfälische Industrie- und Handelskammer* or the Chamber of Industry and Commerce of Southern Westphalia, in light of the undisputed fact that German law governed the agreements. Clear and certain arbitration clauses are more likely to reduce unnecessary and costly litigation.

Sections 9(2) to 9(6) of the 2005 Act comprise provisions relating to an agreement to arbitrate. A written agreement exists if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means (including data message) (Sect. 9(4)(a) and (4A)), or where pleadings in which the existence of an arbitration agreement is acknowledged have been exchanged (Sect. 9(4)(b)). 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. In *Standard Chartered Bank Malaysia Bhd v. City Properties Sdn Bhd & Anor,*[9] the High Court explained Sect. 9 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 Federal Court in *Ajwa for Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd*[10] held that an agreement making reference to a document containing an arbitration clause does not need to be signed in order for that clause to be valid, pursuant to Sects. 9(3) and 9(4) of the 2005 Act.

The use of boilerplate clauses should be carefully scrutinized. For example, in *Arch Reinsurance Ltd v. Akay Holdings Sdn Bhd*, the Federal Court held that an entire agreement clause in one written agreement prevented the arbitration clause in that agreement from being extended to another written agreement executed pursuant to the first written agreement.[11]

9. [2008] 1 MLJ 233.
10. [2013] 5 MLJ 625.
11. Federal Court Civil Appeal No. 02(f)-9-03/2016(W).

c. Model arbitration clause[12]

The AIAC provides the following model clauses:

> "**Model Arbitration Clause**
>
> 'Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the AIAC Arbitration Rules.'
>
> Recommended additions:
>
> - The seat of arbitration shall be […]
> - The language to be used in the arbitral proceedings shall be […]
> - This contract shall be governed by the substantive law of […]
> - Before referring the dispute to arbitration, the parties shall seek an amicable settlement of that dispute by mediation in accordance with the AIAC Mediation Rules as in force on the date of the commencement of mediation."

And:

> "**Model Submission Agreement**
>
> 'The parties hereby agree that the dispute arising out of the contract dated _____ shall be settled by arbitration under the AIAC Arbitration Rules.'"

The law governing the arbitration agreement should 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.[13]

> Recommended choice of law clause to govern the arbitration agreement
>
> The law of this arbitration clause shall be […].

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.[14]

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12. See generally Gary Born, *International Arbitration and Forum Selection Agreements; Drafting and Enforcing* (5th edn, Wolters Kluwers 2016); International Bar Association Council, *IBA Guidelines for Drafting International Arbitration Clauses* (International Bar Association 2010).
13. *Thai-Lao Lignite Co Ltd & Anor v. The Government of the Lao People's Democratic Republic* [2017] 6 AMR 219.
14. *Thai-Lao Lignite Co Ltd & Anor v. The Government of the Lao People's Democratic Republic* [2017] 6 AMR 219.

> Recommended choice of law clause to govern contractual and non-contractual disputes
>
> Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be resolved in accordance with the substantive law of […]

Arbitration agreements in Malaysia may opt out from Part III of the 2005 Act, in whole or in part.[15] Part III deals with additional provisions relating to arbitration in Malaysia, and are applicable by default to domestic arbitrations.

> Recommended clause opting in to Part III in general:
>
> The parties expressly agree that Part III of the Arbitration Act 2005 shall apply.
>
> Recommended clause opting out of Part III in general:
>
> The parties expressly agree that Part III of the Arbitration Act 2005 shall not apply.

Multi-party contracts and multiple contracts may be arbitrated within a single arbitration. However, care must be taken in drafting and tailoring an arbitration clause to allow for consolidation. As a minimum requirement to allow an arbitral tribunal to consolidate or order concurrent hearings of arbitrations, the parties must expressly agree to confer on the arbitral tribunal constituted under the arbitration agreement the power to order consolidation of arbitration proceedings and/or concurrent hearings in accordance with Sect. 40 of the 2005 Act.

Prior to May 2018, domestic parties could limit the extent of judicial intervention in arbitrations and arbitral awards by opting out of Sects. 41 to 43 of the 2005 Act. Note however, that the Arbitration (Amendment) Act (No. 2) 2018 has repealed Sects. 42 and 43 of the 2005 Act.

> Recommended clause opting out of procedures to refer questions of law to the High Court
>
> The parties expressly agree that any reference to the High Court on a question of law under Sections 41, 42 and 43 of the Arbitration Act 2005 shall not be sought with respect to any question of law arising in the course of the arbitration or out of an award.

15. Sect. 3(4) of the 2005 Act.

Prior to the 2018 amendments, the Federal Court in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang*[16] held that the 2005 Act does not provide an arbitral tribunal with an inherent power to award pre-award interest, unless so provided in the arbitration agreement. Arbitration clauses in Malaysia should address the question of whether pre-award interest is to be awarded in respect of any damages that may ultimately be awarded.

> Recommended clause on award of interest
>
> The arbitral tribunal shall include in any award of monetary damages interest from the date of loss or default until the date of payment of the award.

2. PARTIES TO THE AGREEMENT

a. Generally

The general rule in contract law is that all persons are bound by the contracts they enter into, with exceptions for minors and persons of unsound mind. However, a minor may be bound by an arbitration clause if it is found to be for his or her benefit. It is arguable that a person who enters into a contract on behalf of a minor (a parent or guardian) may bind the minor to the agreement. Companies are bound by contracts they enter into even if the purpose of the contract is outside the company's memorandum of association. As such, contracts entered into in good faith and containing arbitration clauses are enforceable against a company.

b. Bankruptcy and insolvency

In respect of insolvent parties, Sect. 49 of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) provides that "where a party to an arbitration agreement is a bankrupt and the person having jurisdiction to administer the property of the bankrupt adopts the agreement, the arbitration agreement shall be enforceable by or against that person". In connection with or for the purpose of bankruptcy proceedings, the High Court may direct reference to arbitration if

(1) the matter is one to which the arbitration agreement applies;
(2) the arbitration agreement was made by a person who has been adjudged a bankrupt before the commencement of the bankruptcy proceedings; and
(3) the person having jurisdiction to administer the property does not adopt the agreement.

16. [2018] 1 MLJ 1.

c. State and State entities

In Malaysia, the State and domestic State agencies may resort to arbitration. Section 5 of the 2005 Act provides that the Act shall apply to any arbitration to which the Federal Government or the Government of any component state of Malaysia is a party. The Attorney General of Malaysia has the necessary powers to represent the government in all legal proceedings and similarly has the power to bind the government.

The 2005 Act is silent on whether a foreign sovereign or a foreign state entity may be bound by an arbitration agreement seated in Malaysia.

Malaysian courts have not had the opportunity to consider the defence of sovereign immunity within the context of arbitration. However, in the context of court litigation, the then Supreme Court in *Commonwealth of Australia v. Midford (Malaysia) Sdn Bhd* declared that Malaysia subscribes to a restrictive version of the defence of sovereign immunity, i.e., that state or sovereign immunity is only attributable to actions by foreign states of a public nature.[17] The test to be applies is whether the impugned acts of a state were of a commercial or private nature. This requires first a contextual demarcation of the breadth of governmental actions, before determining whether the impugned state action falls within the scope governmental action or not.

As the defence of sovereign immunity is a jurisdictional defence as opposed to a substantive defence, it is likely that a similar legal analysis of the defence would apply in arbitration proceedings and in enforcement proceedings.

Notably, Malaysia is not a signatory to the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004).

d. Multi-party arbitration

Section 40(1) of the 2005 Act provides parties the option to expressly agree for consolidation and concurrent hearings of arbitral proceedings. This would be exercised where there is an agreement among the parties. Rule 9 of the AIAC Arbitration Rules 2018 provides for the consolidation of arbitration proceedings. Since the AIAC Arbitration Rules 2018 adopts the UNCITRAL Rules, it incorporates provisions pertaining to multi-party arbitrations and the appointment of arbitrators.

Section 40(2) of the 2005 Act confirms that an arbitral tribunal has no inherent power to order the consolidation of arbitrations or for concurrent hearings of arbitrations. This mirrors the position under the repealed Arbitration Act 1952 ("1952 Act"), where the High Court in *Lingkaran Luar Butterworths (Penang) Sdn Bhd v. Perunding Jurutera Dah Sdn Bhd & Ors* held that a tribunal has no inherent power to order consolidation of arbitration proceedings or to order for concurrent arbitration hearings.

17. [1990] 1 MLJ 475. See also *Village Holdings Sdn Bhd v. Her Majesty The Queen In Right of Canada* [1988] 2 MLJ 656.

3. DOMAIN OF ARBITRATION

a. Arbitrability

Section 4(1) of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) 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 or the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia". It is also noteworthy that under Sect. 4(2) of the 2005 Act, "the fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration shall not, by itself, indicate that a dispute about that matter is not capable of determination by arbitration".

b. Filling gaps and adapting contracts

There are no Malaysian cases to date dealing with whether an arbitrator's power to fill gaps in a contract or to adapt a contract to fundamentally changed circumstances goes to substance or jurisdiction, i.e., whether it is an issue to be determined in accordance with the applicable proper law, or an issue which goes into the powers and jurisdiction of an arbitral tribunal to be decided under the *lex arbitri*. Note that there is no provision in the 2005 Act which vests the arbitral tribunal with the power to rectify documents.

As a matter of jurisdiction, the Federal Court in *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd* [2016] 5 MLJ 417 appeared to approve the decision of the English Court of Appeal in, *Ashville Investment Ltd v. Elmer Contractors Ltd* [1988] 2 All ER 577, which, *inter alia*, held that there is no reason in principle why an arbitrator cannot make an order for the rectification of a contract, provided "this is justified at law and by the arbitration agreement". Some contracts provide for such jurisdiction: see, e.g., Clause 34.8(a) of the PAM 2006 Form of Building Contract, which expressly provides the arbitral tribunal with power to rectify the contract "so that it accurately reflects the true agreement made" between the parties.

It has not been decided in Malaysia whether the power to adapt a contract to fundamentally changed circumstances is an issue which goes into the powers of an arbitral tribunal to be decided under the *lex arbitri*, or an issue to be determined in accordance with the proper law of the dispute. That said, under Malaysian substantive contract law, the remedy for fundamentally changed circumstances lies only in a declaration that a contract is void for frustration.

As a matter of substantive law, the Malaysian substantive contract law remedy of rectification is not available for the purposes of adapting a contract to fundamentally changed circumstances. At best, it is applicable to filling gaps

in a contract, only where, through fraud or a mutual mistake of the parties, the instrument of contract does not truly express the intention of the parties.[18]

4. SEPARABILITY OF ARBITRATION CLAUSE

The validity of an arbitration agreement is not affected by the validity of the main contract. Section 18(2) of the Arbitration Act 2005 (see **Annex I** hereto) provides that "an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement" and "a decision by the arbitral tribunal that the agreement is null and void shall not *ipso jure* entail the invalidity of the arbitration clause".

An arbitration agreement may be invalid if the main contract is vitiated by factors relating to essential elements of contract, such as duress, mistake and bribery.[19]

5. EFFECT OF THE AGREEMENT (SEE ALSO CHAPTER V.4 – JURISDICTION)

a. Duty of court

There are two principal methods by which the courts may give effect to an arbitration agreement, namely to stay an action or to refer the dispute to arbitration pursuant to Sect. 10 of the Act. The Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) provides that an application must be made before taking any steps in the action to stay the action.

Section 10 of the 2005 Act applies to arbitration agreements which provide for domestic arbitration and international arbitration. Prior to the amendment of the 2005 Act in 2011, it was not entirely clear whether a Malaysian court had jurisdiction to grant injunctive relief in support of arbitrations seated in a foreign jurisdiction, and inconsistent decisions arose in the High Court.

In pre-2011 case law, *Innotec Asia Pacific Sdn Bhd v. Innotec GmBH*[20] ("*Innotec*") involved a dispute between a Malaysian company and a German company in relation to a partnership contract and resellers agreement. The plaintiff had filed an application for an injunction against the defendant to restrain it from commencing and/or further proceeding with arbitration in Germany. From the other side, the defendant applied for a stay of proceedings pursuant to Sect. 10 of the 2005 Act. The plaintiff contended that the defendant's application under Sect. 10 of the 2005 Act was misconceived, as the 2005 Act does not apply to arbitrations held outside Malaysia. The High

18. See Sects. 31 to 33 of the Specific Relief Act 1950. See also the Federal Court's decision in *Yuson Bien & Anor v. Bankers Trust Co Ltd* [1980] 1 MLJ 32.
19. See *Susu Lembu Asli Marketing Sdn Bhd v. Dutch Lady Milk Industries Bhd* [2004] 2 MLJ 230.
20. [2007] 8 CLJ 304.

Court dismissed the application for an injunction and allowed the application for a stay, observing that it was incorrect and erroneous on the part of the plaintiff to suggest that the 2005 Act, following Sect. 3, only applied to arbitration (domestic or otherwise) where the seat is in Malaysia and excludes international arbitration. The language of the section was held not to support such an interpretation.

Notwithstanding the decision of the High Court in *Innotec,* the High Court in *Aras Jalinan Sdn Bhd v. Tipco Asphalt Public Company Ltd & Ors*[21] dealt with a situation where the Malaysian plaintiff filed an injunction against two defendants to restrain the defendants from preventing the plaintiff from obtaining shares in the third defendant, a Malaysian company, pending arbitration pursuant to the settlement agreement between the plaintiff and the defendants in Singapore. The issue required the Court to determine whether it 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 only had jurisdiction to grant injunctive relief in matters where the seat of arbitration is in Malaysia. The learned Judicial Commissioner held that the jurisdiction of the Court must be expressly provided by statute and did not agree with the approach taken in *Innotec Asia Pacific Sdn Bhd v. Innotec GmBH*.

The 2011 amendment to the 2005 Act now addresses this situation. Section 10(4) of the 2005 Act now provides that the High Court has jurisdiction to stay proceedings in an arbitration where the seat of arbitration is outside of Malaysia.

Where a party invokes an arbitration agreement under Sect. 10(1) of the 2005 Act to stay court proceedings brought in breach of the arbitration agreement, the court will examine whether there is an arbitration agreement between the parties which is not null and void, inoperative or incapable of being performed.

In *TNB Fuel Services Sdn Bhd v. China National Coal Group Corp*,[22] the Court of Appeal 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 ruled 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. This was upheld by the Federal Court in *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd*, where it was held that, in the context of an application to stay court proceedings brought in breach of an arbitration agreement, a challenge to that application on the grounds that an arbitration agreement is null and void, inoperative or incapable of being performed, is a matter which ought to be

21. [2008] 5 CLJ 654.
22. [2013] 4 MLJ 857.

decided by the arbitral tribunal at first instance.[23] There is no element of discretion to be exercised by the courts.[24]

However, the court may impose conditions when it grants a stay. For example, in *Majlis Ugama Islam dan Adat Resam Melayu Pahang v. Far East Holdings Bhd & Anor,*[25] after the court had granted a stay, a condition was imposed pursuant to Sect. 10(2), namely that the dispute be referred to the Director of the AIAC for an appointment of an arbitrator as provided under Sect. 13(5) of the 2005 Act. It does not, however, follow that a grant of stay compels one party to commence arbitration, unless ordered to do so.

In light of the 2011 amendments to Sect. 10(1) of the 2005 Act, there is no need for the court to determine whether a dispute exists between the parties.[26]

b. Court examination of arbitration agreement

In determining whether the conditions for the grant of a stay have been met, a court only undertakes a *prima facie* review of the evidence to determine whether there is an arbitration agreement between the parties which is not null and void, inoperative or incapable of being performed.[27] In this regard, the Malaysian courts appeared to adopt the approach of the Canadian Supreme Court in *Dell Computer Corporation, Appellant v. Union des Consommateurs and Oliver Sumoulin, Respondents, and Canadian Internet Policy and Public Interest Clinic, Public Interest Advocacy Centre, ADR Chambers Inc ADR Institute of Canada and London Court of International Arbitration, Interveners,* [28] namely:

(1) Any challenge to the arbitrator's jurisdiction or arbitration agreement must be resolved first by the arbitral tribunal;
(2) A court may opt to make the first instance decision if the challenge is based solely on a question of law;
(3) If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration; and
(4) Where questions of mixed law and fact are concerned, the court must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.

The latest moment at which a party can invoke the lack of competence of the court by virtue of an arbitration agreement between the parties under Sect. 10(1) of the 2005 Act is before that party takes "*any other steps in the proceedings*". The High Court in *ZAQ Construction Sdn Bhd v. Putrajaya*

23. [2016] 5 MLJ 417.
24. *Ibid.*
25. [2007] 10 CLJ 318.
26. *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd* [2016] 5 MLJ 417.
27. *Ibid.*
28. 2007 SCC 34.

Holdings Sdn Bhd considered such steps as requiring a definitive, conscious and deliberate participation in the court proceedings.[29] The Federal Court in *Sanwell Corp v. Trans Resources Corp Sdn Bhd & Anor* deciding under the Arbitration Act 1952, considered such steps generally to be one which indicates an election to proceed with the suit and to invoke the jurisdiction of the court.[30]

Examples of what amounts to taking a step in the proceedings have been considered by the court to be as follows:

(1) Filing of a defence or affidavit in response to contest a matter;[31] and
(2) Seeking an extension of time.[32]

Examples of what does not amount to taking a step in the proceedings have been considered by the court to be as follows:

(1) Entering an appearance before the court;[33]
(2) Filing an application to stay proceedings pending reference to arbitration under Sect. 10 of the 2005 Act;
(3) Attending early case managements before the registrar of the court;[34] and
(4) The filing of applications, substantive defences or responses to a matter which expressly reserves the right to refer the dispute to arbitration, and drafted in contemplation of staying the proceedings pending reference to arbitration.[35]

c. Kompetenz-kompetenz

Section 18 of the Arbitration Act 2005 provides that the arbitral tribunal has the power to determine its own jurisdiction and the admissibility of a claim to arbitration. The principle of competence-competence is recognized by the Federal Court as being enshrined in Sect. 18 of the 2005 Act in *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd*.[36]

Two types of challenge pleas may be raised pursuant to Sect. 18 of the 2005 Act: the absence of the arbitral tribunal's jurisdiction and the tribunal

29. [2014] 10 MLJ 633.
30. [2002] 2 MLJ 625. Referred to with approval by the Court of Appeal in *Comos Industry Solution GMBH v. Jacob and Toralf Consulting Letrikon Sdn Bhd & Ors* [2012] 4 MLJ 573.
31. *NFC Labuan Shipleasing I Ltd v. Semua Chemical Shipping Sdn Bhd* [2017] 5 AMR 611.
32. *Sanwell Corp v. Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625.
33. The Rules of Court 2012 has dispensed with the procedure to enter a conditional appearance before a court, which is ordinarily entered to reserve submission to the jurisdiction of the court. There is now only a single mode of entering an appearance in court for actions commenced by a writ (for proceedings in which a substantial dispute of fact is likely) and no entry of appearance is required for actions commenced by originating summons (for proceedings in which there is unlikely to be any substantial dispute of fact, or in which the principal question at issue is likely to be on the construction of any written law or document).
34. *ZAQ Construction Sdn Bhd v. Putrajaya Holdings Sdn Bhd* [2014] 10 MLJ 633.
35. *Comos Industry Solution GMBH v. Jacob and Toralf Consulting Letrikon* [2012] 4 MLJ 573.
36. [2016] 5 MLJ 417.

exceeding the scope of its existing authority. The arbitral tribunal can rule on both either as a preliminary question or in an award on the merits.

Under Sect. 18, a plea that an arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter is raised during the arbitral proceedings. Notwithstanding the time limits set in Sect. 18, the arbitral tribunal may admit such a plea if it considers the delay justified (see Sect. 18(6)).

In circumstances where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may appeal to the High Court to decide the matter within thirty days after having received notice of that ruling (Sect. 18(8)). No appeal lies against the decision of the High Court under Sect. 18(8) of the 2005 Act. In *Capping Corp Ltd & Ors v. Aquawalk Sdn Bhd & Ors*,[37] the Court of Appeal restated that the regime under the 2005 Act dictates minimal interference by the courts, as reflected in the fact that Sect. 18 gives an arbitrator the power to rule on his or her own jurisdiction.

In *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd*, the Court found that this principle applies even in the context where, in an application to stay court proceedings brought in breach of an arbitration agreement, the jurisdiction of an arbitral tribunal sought to be constituted under an allegedly impugned arbitration agreement is challenged.[38]

Chapter III. Arbitrators

1. QUALIFICATIONS

a. Requirements and restrictions

The Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) does not prescribe specific qualifications that persons must possess in order to be eligible for appointment to an arbitral tribunal.

Section 13 of the 2005 Act provides that no person shall be precluded by reason of nationality from acting as an arbitrator. As a result of amendments to the Legal Profession Act 1976, which came into effect in June 2014, there are now no restrictions on international arbitrators and lawyers participating in arbitral proceedings in Malaysia, except for arbitral proceedings held or seated in the state of Sabah.[39]

37. [2013] 6 MLJ 579.
38. [2016] 5 MLJ 417.
39. *Samsuri bin Baharuddin & 813 Ors v. Mohamed Azahari bin Matiasin (and Another Appeal)* [2017] 2 AMR 410.

b. Disclosure

Section 14(1) of the 2005 Act provides that a person who is approached to be an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.

In *Dato' Dr Muhammad Ridzuan bin Mohd Salleh & Anor v. Syarikat Air Terengganu Sdn Bhd*, it was held that an arbitrator has a continuing duty of disclosure until the conclusion or termination of the arbitral proceedings, a failure of which may result in the nullity of the award on an application to set aside an award.[40]

2. APPOINTMENT OF ARBITRATORS

Under the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto), where the parties fail to make provision for the appointments procedure in the arbitration agreement, or if there is a 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 within thirty days, failing which the parties can proceed to court to have the relevant appointment(s) made.

Section 13(8) of the 2005 Act provides guidance as to how the Director of the AIAC should exercise his discretion in making an appointment. There is no right of appeal from the decision of the Director of the AIAC.

Section 49 of the 2005 Act provides the Director of the AIAC (or any other person or institution designated or requested by the parties to appoint an arbitrator) are immune from liability for anything done or omitted in the discharge of its function, unless the act or omission is shown to have been in bad faith.

3. NUMBER OF ARBITRATORS (SEE ALSO CHAPTER V.2 – MAKING OF THE AWARD)

Section 12 of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) provides that the parties are free to determine the number of arbitrators. When the parties fail to determine the number of arbitrators, Sect. 12(2) of the 2005 Act provides that in the case of international arbitration, the arbitral tribunal shall consist of three arbitrators. For domestic arbitrations, the arbitral tribunal shall consist of a single arbitrator.

The 2005 Act does not restrict the number of arbitrators to odd numbers only. However, it is generally imprudent for parties to agree to an even number of arbitrators.

40. [2012] 3 MLJ 737.

4. CHALLENGE TO ARBITRATORS

a. Grounds

Section 14(3) of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) provides that an arbitrator may be challenged only if the circumstances give rise to justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator does not possess qualifications agreed to by the parties.

According to the High Court in *Sebiro Holdings Sdn Bhd v. Bhag Singh & Anor*, 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.[41]

b. Procedure

Section 15 of the 2005 Act provides that a challenge is to be made first to the arbitral tribunal itself within fifteen days from the arbitrator's appointment. Where the challenged arbitrator does not withdraw himself, the arbitral tribunal is to make a decision on the challenge.

In the event that the challenge is unsuccessful, the challenging party may apply to the High Court under Order 69 of the Rules of Court 2012 (see **Annex II** hereto) to make a decision on the challenge within thirty days after having received notice of the decision rejecting the challenge. A party challenging an arbitrator cannot make an application to the court to disqualify an arbitrator without first challenging an arbitrator under Sect. 15 of the 2005 Act.[42]

There does not appear to be any requirement that the tribunal's or institution's decision on the challenge has to contain reasons or be written.

5. TERMINATION OF THE ARBITRATOR'S MANDATE

Section 16 of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) provides that an arbitrator's legal or physical inability to perform his functions is a reason for revoking his authority. Section 16(1) refers to an arbitrator who is legally or physically unable to perform the function entrusted to him or who for some reason fails to act without undue delay. The non-performing arbitrator can voluntarily withdraw from the office or the parties can agree to terminate his mandate. Section 16(1) provides three grounds that constitute an arbitrator's inability:

41. [2014] 11 MLJ 761.
42. *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.

(1) he is legally unable to perform his functions;
(2) he is factually unable to perform his functions;
(3) he fails to act without undue delay for other reasons.

Under Sect. 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 Sect. 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 is non-appealable. Section 16(3) further provides that if an arbitrator withdraws from his office for the reasons listed in Sect. 16(1) and (2), this shall not imply that he accepts the validity of those grounds. This provision facilitates the smooth withdrawal of the arbitrator and avoids lengthy disagreement.

6. LIABILITY OF ARBITRATORS

Section 47 of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) provides that an arbitrator shall not be liable for any act or omission in respect of anything done or omitted to be done in the discharge of the arbitrator's functions unless the act or omission is shown to have been in bad faith. At present, there do not appear to be any cases where Sect. 47 of the 2005 Act has been invoked.[43]

Chapter IV. Arbitral Procedure

1. PLACE OF ARBITRATION (SEE ALSO CHAPTER V.3 – FORM OF THE AWARD)

Section 22 of the Arbitration Act 2005 (see **Annex I** hereto) provides that the parties are free to agree on the seat of arbitration. Section 22 of the 2005 almost adopts Art. 20 of the Model Law verbatim, except that the latter uses the term "place of arbitration" and not "seat of arbitration".

In the event the parties fail to determine the seat of arbitration, the decision by default is left with the arbitral tribunal, having due regard to the circumstances of the case, including the convenience of the parties.

43. See however *Asean Bintulu Fertilizer Sdn Bhd v. Wekajaya Sdn Bhd & Another Appeal* [2018] 2 CLJ 257.

2. ARBITRAL PROCEEDINGS IN GENERAL

a. Mandatory provisions
The Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) generally leaves the question of procedure to the parties to decide, subject to overriding rules requiring fairness.

b. Determining procedure
In the event the parties fail to agree on the procedures to be adopted, Sect. 21(2) provides that the arbitrator may, subject to the provisions of the 2005 Act, conduct the arbitration in such manner as it considers appropriate. This includes the power to:

(1) determine the admissibility, relevance, materiality and weight of any evidence;
(2) draw on its own knowledge and expertise;
(3) order the provision of further particulars in a statement of claim or defence;
(4) order the giving of security for costs;
(5) fix and amend time limits within which various steps in the arbitral proceedings must be completed;
(6) order the discovery and production of documents or materials within the possession or power of a party;
(7) order the interrogatories to be answered;
(8) order that any evidence be given on oath or affirmation; and
(9) make such other orders as the arbitral tribunal considers appropriate.

Although the approach is for the parties themselves to determine the procedure, parties would in practice normally consult the arbitral tribunal before agreeing on procedural matters. An arbitrator who is inconvenienced by a change in procedure or finds the procedure adopted to be unacceptable may resign. In any event, the parties' freedom to set out the arbitral procedure is restricted by the requirement that the agreed procedures are not in conflict with the public policy of Malaysia. Parties are also not permitted to adopt procedures that empower the arbitral tribunal to compel third parties to produce documents or to submit to examination. Any procedure that disregards the rules of natural justice cannot be adopted.

c. Written pleadings
With respect to the exchange of written pleadings, Sect. 25 of the 2005 Act requires the claimant to state the facts supporting the claim, the points in issue and the relief or remedy sought. The requirements in Sect. 25 in respect of the claim also apply to counterclaims by virtue of Sect. 2(2) of the 2005 Act. Section 25 also provides that the defence shall be in respect of the particulars set out in the claim. These general provisions are usually elaborated further in

the various arbitration rules, institutional or otherwise. These pleadings are to be delivered within the time period agreed by the parties, or in default of which, the timelines set by the arbitral tribunal.

d. Oral hearing
Oral hearings are usually held except where the parties have agreed otherwise. Certain institutional rules also expressly set the procedures for a "documents-only" arbitration.

3. EVIDENCE

a. General
Section 21 of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) provides that in the event the parties fail to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, the arbitrator shall have the power to determine the admissibility, relevance, materiality and weight of any evidence. Section 2 of the Evidence Act 1950 provides that arbitrators are not bound by the rules of evidence contained in the Evidence Act 1950.

Most experienced arbitrators in Malaysia who preside over domestic and international arbitrators generally adopt the IBA Rules on the Taking of Evidence in International Arbitration in the first procedural order for organising the proceedings as being the applicable framework of procedural rules of evidence, but subject to the arbitral tribunal retaining the discretion to depart from them where appropriate.

b. Witnesses (witnesses of fact and party-appointed expert witnesses)
In respect of witnesses, all persons are competent to testify except those who are

(1) unable to understand the questions put to them; or
(2) unable to give rational answers to those questions due to
  (i) tender age;
  (ii) extreme old age;
  (iii) disease, whether of body or mind; or
  (iv) any other cause of the same kind.

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. In respect of experts, the usual practice is for each party to adduce their own expert evidence. 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's or the other party's expert witness.

Section 21(3)(h) of the 2005 Act provides that the arbitral tribunal shall have the power to order that any evidence be given on oath or affirmation. In practice, witnesses are usually sworn in before the arbitrators, even where no express order is made to that effect. In respect of compelling a witness to testify before an arbitral tribunal, Sect. 29 of the 2005 Act provides that any party may, with the approval of the arbitral tribunal, apply to the High Court for assistance in taking evidence. Where such an application is made, the High Court may order the attendance of a witness to give evidence or, where applicable, produce documents on oath or affirmation before an officer of the High Court or any other person, including the arbitral tribunal.

Normally, if there is already a written witness statement, a witness is asked a few questions by the party calling him to establish his identity, his or her involvement in the matter and any relevant expertise the witness may have. Following this initial questioning, the cross-examination of the witness by the other party will then commence. Re-examination by the party calling the witness will usually lead to the conclusion of that witness' testimony.

c. Documentary evidence

Section 21(3)(f) of the 2005 Act provides that the arbitral tribunal shall have the power to order the discovery and production of documents or materials within the possession or power of a party. In the event of non-compliance, Sect. 19 of the 2005 Act permits a party to apply for an interim measure seeking discovery from the arbitral tribunal. The other option is to apply for an interim measure from the High Court under Sect. 11 of the 2005 Act.

4. TRIBUNAL-APPOINTED EXPERTS (SEE CHAPTER IV.3 FOR PARTY-APPOINTED EXPERT WITNESSES)

Section 28 of the Arbitration Act 2005 (see **Annex I** hereto) provides that unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal. The arbitral tribunal may also require a party to give the expert any relevant information or to produce or to provide access to any relevant documents, goods or other property for the expert's inspection.

If a party considers it necessary and unless the parties agree otherwise, the expert shall, after delivery of a written or oral report, participate in a hearing where the parties have the opportunity to put questions to the expert and to present other expert witnesses in order to testify on the points in issue.

5. INTERIM MEASURES OF PROTECTION (SEE ALSO CHAPTER I.1 – LAW ON ARBITRATION)

a. Categories of interim measures

The Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) permits two categories of interim measures of protection. Both the arbitral tribunal and the High Court may order interim measures of protection. Prior to May 2018, the High Court possessed wider powers to order interim measures of protection as compared to an arbitral tribunal.

The 2005 Act as enacted and amended in 2011 did not adopt Chapter IV.A of the UNCITRAL Model Law. However, the Arbitration (Amendment) Act (No. 2) 2018 has adopted Chapter IV.A of the UNCITRAL Model Law.

b. Powers of the arbitrator

Under Sect. 19 of the 2005 Act, the arbitrator, in the course of the arbitral proceedings, is given the power to order interim measures such as orders with respect to the discovery of documents within the possession and control of the parties.

The arbitral tribunal is also provided with various powers to ensure the proper conduct and regulation of the arbitral process. For instance, the tribunal is often expressly granted 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 also has the power to order interim injunctions and other interim measures of relief. Moreover, the powers listed under Sect. 19(1)(a), (b), (c) and (d) of the 2005 Act correspond with the parallel powers granted to the High Court under Sect. 11(1)(a), (b), (c) and (f), which are drafted in identical terms.

c. Powers of the courts

By contrast, the powers of the High Court under Sect. 11(1)(d), (e), (g) and (h) of the 2005 Act are excluded from the arbitral tribunal. The arbitral tribunal therefore has no powers to make orders relating to:

(1) the appointment of a receiver;
(2) securing the amount in dispute;
(3) ensuring against the dissipation of assets (Mareva type remedies); or
(4) interim injunctions.

The arbitrator is also not able to oblige a party to give a bank guarantee.

Section 11(e) of the 2005 Act appears to be sufficiently wide to allow the High Court to oblige a party to give a bank guarantee to secure the amount in dispute.

6. REPRESENTATION AND LEGAL ASSISTANCE

Section 3A of the Arbitration Act 2005 (see **Annex I** hereto) provides the right for a party to arbitral proceedings to be represented in the proceedings by any representative appointed by the party. There is no statutory requirement that a parties' representative must be a lawyer, although in practice this is usually the case.

In respect of foreign lawyers, the High Court of Malaya in *Zublin Muhibbah Joint Venture v. Government of Malaysia*[44] held that a foreign lawyer who was not an advocate and solicitor within the meaning of the Legal Profession Act 1976 was not prohibited from representing parties in arbitral proceedings in West Malaysia, as the Legal Profession Act 1976 did not apply to arbitral proceeding in West Malaysia.

However, in *Samsuri bin Baharuddin & 813 Ors v. Mohamed Azahari bin Matiasin (and Another Appeal)*[45] the Federal Court affirmed a constitutional prohibition on foreign lawyers – including lawyers admitted into practice in the High Court of Malaya (i.e., West Malaysian lawyers) – who are not admitted into practice in the High Court of Sabah and Sarawak within the meaning of the Advocates Ordinance 1953, from representing parties in arbitration proceedings seated or held in the East Malaysian state of Sabah, unless such foreign lawyers have duly secure immigration approvals and a work permit.

7. DEFAULT

Section 27 of the Arbitration Act 2005 (see **Annex I** hereto) provides that if the claimant fails to communicate the statement of claim without showing sufficient cause, the arbitral tribunal shall terminate the proceedings. Where the respondent fails to communicate the statement of defence, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations. In the event that any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue with the proceedings and make an award on the evidence before it. Where the claimant fails to proceed with the claim, the arbitral tribunal may make an award dismissing the claim or give directions, with or without conditions, for the speedy determination of the claim.

44. [1990] 2 CLJ Rep 371.
45. [2017] 2 AMR 410.

8. CONFIDENTIALITY OF THE AWARD AND PROCEEDINGS

a. Confidentiality of the arbitral award and proceedings

Prior to May 2018, the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) did not contain any rules pertaining to confidentiality. However, the existence of an arbitration agreement implies a duty of confidentiality, even in the absence of any express term in the arbitration clause or its underlying agreement, as "it is now accepted … that arbitrations are private and confidential".[46] Various institutional rules for arbitration also generally provide for the confidentiality of arbitration proceedings.[47]

At present, Sect. 41A(1) of the 2005 Act provides that no party may publish, disclose or communicate any information relating to the arbitral proceedings under the arbitration agreement or any award made in those proceedings, unless otherwise agreed by the parties. However, such disclosure is allowed where disclosure (1) is made to protect or pursue a legal right or interest of the party or to enforce or challenge an award in Malaysia or any other jurisdiction, (2) is required to be made to any government body, regulatory body or court or tribunal under law, or (3) is made in the course of professional privilege (Sect 41A).

b. Confidentiality of arbitration-related court proceedings

Prior to May 2018, there were no statutory provisions in the 2005 Act relating to confidentiality of arbitration-related court proceedings. However, the Court of Appeal in *Petronas Penapisan (Melaka) Sdn Bhd v. Ahmani Sdn Bhd* recognized confidentiality as one of the main policies underlying the 2005 Act.[48]

Documents filed in legal proceedings for recognition and enforcement form part of the High Court's records, which are generally not accessible by the public. However, hearings for recognition and enforcement are generally held in open court and are therefore not confidential. Judgments of the court are also generally available to the public.

Absent specific rules in the Rules of Court 2012 to preserve confidentiality, no steps could be taken to avoid publication or to remove the names of the parties from the court's records or in reported decisions. In light of there being no statutory provision on confidentiality at the time, the High Court in *Sabah Electricity Sdn Bhd (previously known as "Lembaga Letrik Sabah") v. Sandakan Power Corporation Sdn Bhd and another suit*, held that the court does not have any power to order a redaction of any part of the award sought to

46. *Malaysian Newsprint Industries Sdn Bhd v. Bechtel International Inc* [2008] 5 MLJ 254.
47. See for example, Rule 16 and Art. 28 of the AIAC Arbitration Rules.
48. [2016] 2 MLJ 697.

be registered and enforced, where proceedings are commenced to register and enforce an award in Malaysia.[49]

At present, Sect. 41B(1) of the 2005 Act provides that court proceedings under the 2005 Act are to be heard otherwise than in open court. However, the court may order the proceedings to be heard in open court on the application of any party, or if the court is satisfied that the particular proceedings ought to be heard in open court (Sect. 41B(2)(a) and (b)).

Chapter V. Arbitral Award

1. TYPES OF AWARD

Section 2(1) of the Arbitration Act 2005 (see **Annex I** hereto) defines an award as "a decision of the arbitral tribunal on the substance of the dispute and includes any final, interim or partial award and any award on costs or interest but does not include interlocutory orders". 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. MAKING OF THE AWARD

a. Decision-making

Where the arbitral tribunal consists of more than one arbitrator, Sect. 33(2) of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) provides that the signatures of the majority of all members of the arbitral tribunal shall be sufficient, provided that the reason for any omitted signature is stated.

Section 31 of the 2005 Act provides that "unless otherwise agreed by the parties, in any arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members." As such, a tribunal consisting of more than one arbitrator arrives at its award by majority.

b. Dissenting opinions

The 2005 Act is silent on dissenting opinions by arbitrators. It can however be implied from Sect. 33(2) that a dissenting arbitrator would have indicated his dissent to the other members of the arbitral tribunal before the majority place their signatures on the award. As to whether a dissenting opinion is to be annexed to the award, the position would appear to be that a dissenting

49. Kuala Lumpur High Court Originating Summons No. WA-24NCC(ARB)-17-02/2017.

arbitrator may sign the award with his dissenting opinion. Alternatively, he may not sign the award at all.

In respect of time limits, the 2005 Act does not prescribe any time limit for the making of the award. Section 46 of the 2005 Act does, however, provide that where the time for making an award is limited by the arbitration agreement, either the arbitral tribunal or the parties may apply to the High Court to extend the time for the making of the award.

3. FORM OF THE AWARD

Section 33 of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) provides that an award shall be made in writing and shall be signed by the arbitrator. Where the arbitral tribunal consists of three or more arbitrators, Sect. 33(2) of the 2005 Act provides that the signatures of the majority of all members of the arbitral tribunal shall be sufficient, provided that the reason for any omitted signature is stated. An award must state the reasons upon which it is based, unless otherwise agreed by the parties or where the award is an award on agreed terms. In addition, an award must also state its date and the seat of the arbitration and shall be deemed to have been made at that seat.

Section 33(3) of the 2005 Act requires an award to state the reasons upon which it is based, unless the parties have agreed otherwise. In *Tanjung Langsat Port Sdn Bhd v. Trafigura Pte Ltd and another case*, the High Court held that the duty to give reasons within the context of the 2005 Act does not form part of the requirements of natural justice within the context of Malaysian law[50] (which is composed of the rule against bias and the right to be heard only),[51] and as such was not a ground on which an arbitral award may be set aside under Sects. 37(1)(b)(ii) and (2)(b) of the 2005 Act. The following principles were considered applicable by the High Court:

(1) arbitrators are under no duty to deal with every possible argument on the facts and to explain why they attach more weight to some evidence than to other evidence;
(2) arbitrators are not in general required to set out in their reasons an explanation for each step taken by them in arriving at their evaluation of the evidence and in particular for their attaching more weight to some evidence than to other evidence or for attaching no weight at all to such other evidence;
(3) the standard of explanation required in every case must correspond to the requirements of the case. Costs and delays are relevant factors to consider

50. [2016] 4 CLJ 927.
51. *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah And Anor & Another Appeal* [1998] 3 MLJ 289.

when determining the extent to which reasons and explanations are to be set out in detail;
(4) in very clear cases with specific and straightforward factual or legal issues, reasons may be dispensed with. Its conclusions will be sufficient because the reasons behind the conclusion are a matter of necessary inference;
(5) decisions or findings which do not bear directly on the substance of the dispute or affect the final resolution of the parties' rights may not require detailed reasoning. As a rule of thumb, the more profound the consequences of a specific decision, the greater the necessity for detailed reasoning;
(6) there should be a summary of all the key relevant evidence but not all the detailed evidence needs to be referred to;
(7) the parties' opposing stance and the findings of fact on the material issue should be set out, but there need not be an explicit ruling on each and every factual issue;
(8) the decision should demonstrate an examination of the relevant evidence and the facts found with a view to explaining the final outcome on each material issue; and
(9) it is sufficient that the contents of the arbitral award, if taken as a whole informs the parties of the bases on which the arbitral tribunal reached its decision on the material or essential issues.

Once an award is made, a copy of the award signed by the arbitrator(s) shall be delivered to each party.

In respect of pre-award interest, the Federal Court in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* held that Sect. 33(6) of the 2005 Act provides for post-award interest only.[52] As such, unless otherwise provided in the arbitration agreement, an arbitrator only has the power to award post-award interest, not pre-award interest.

In respect of post-award interest, the Federal Court in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* held that post-award interest must be pleaded in the parties' respective pleadings in the arbitration proceedings, failing which post-award interest cannot be granted.[53]

52. [2018] 1 MLJ 1.
53. *Ibid.*

4. JURISDICTION (SEE ALSO CHAPTER II.5 – EFFECT OF THE AGREEMENT)

a. Powers of arbitrators
Section 18 of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) (which encompasses Art. 16 of the Model Law), provides that the arbitral tribunal has the power to determine its own jurisdiction.

b. Form of jurisdictional decision
The arbitral tribunal may rule on a plea challenging its jurisdiction either as a preliminary question or in an award on the merits.

c. Appeal
Where the arbitral tribunal rules on such a plea as a preliminary question, any party may then appeal to the High Court within thirty days after having received notice of that ruling. No appeal shall lie against the decision of the High Court.

d. Timing of objection
A plea that the arbitral tribunal has no jurisdiction must be raised no later than the submission of the statement of defence. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged as being beyond the scope of authority is raised during the arbitral proceedings. In the event there is a delay in raising the plea, the arbitral tribunal may nevertheless admit such plea if it considers the delay justified.

e. Subject-matter waiver
Section 18 does not state the consequences of a failure to raise a plea of no jurisdiction. Section 7 of the 2005 Act which deals with waiver of the right to object, would not apply here because a waiver under Sect. 7 applies to any provision of the 2005 Act from which the parties may derogate. Section 18 is not a provision parties can derogate from.

Under the Arbitration Act 1952, a party may avail itself of a passive remedy where there is a defect in the jurisdiction of the tribunal.[54]

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 Sects. 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 is estopped from relying on a jurisdictional objection as a basis to refuse

54. *State Government of Sarawak v. Chin Hwa Engineering Development Co* [1995] 4 CLJ 1; *Bauer (M) Sdn Bhd v. Daewoo Corp* [1999] 4 CLJ 665.

recognition or enforcement of an arbitral award in Malaysia.[55] Although the decision did not touch upon the failure to raise a jurisdictional objection under Sect. 18 of the 2005 Act, it regarded the failure of an award-debtor to raise a jurisdictional objection in the arbitral proceedings seated in London as giving rise to an estoppel from denying its acceptance of the arbitral tribunal's jurisdiction.

However, in *Alami Vegetable Oil Products Sdn Bhd v. Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd*, the Federal Court appeared to allow a party to avail itself of a passive remedy, notwithstanding any prior omission to raise a jurisdiction objection during the arbitral proceedings.[56] No grounds for the judgment are available.

There has not been any published decision dealing with whether Sect. 37 (Application for setting aside) of the 2005 Act will remain applicable even if a plea is raised within the time limits but without success. It should be noted however that a violation of public policy or arbitrability can be raised at any time during the proceedings or later during the setting aside stage, without being precluded by the time limits in Sect. 18.

f. Role of court

Section 18(9) of the 2005 Act provides that while an appeal against the arbitral tribunal's ruling on jurisdiction is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

In respect of an application brought under Sect. 10(1) of the 2005 Act to stay court proceedings brought in breach of an arbitration agreement, the approach of the court in reviewing the jurisdiction of an arbitral tribunal at different stages of arbitration proceedings is set out in *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd*.[57] Where court proceedings are brought in breach of an arbitration agreement, the challenge to the validity of an arbitration agreement in an application to stay the impugned court proceedings under Sect. 10(1) of the 2005 Act is to be determined by the arbitral tribunal at first instance. Thereafter, any party aggrieved by the tribunal's jurisdiction determination may appeal to the High Court under Sect. 18(6) of the 2005 Act within thirty days from the date of the jurisdictional determination. As such, a challenge to the jurisdiction of an arbitral tribunal must be made during the arbitral proceedings itself, not at the court hearing an application for a stay under Sect. 10(1) of the 2005 Act.

55. [2014] 3 MLJ 648.
56. Federal Court Civil Appeal No. 02-79-10/2015.
57. [2016] 5 MLJ 417.

5. APPLICABLE LAW

a. Domestic and international arbitration

Section 30(1) of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) provides that the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed as directly referring to the substantive law of that State and not to its conflict of laws rules, unless otherwise expressed (Sect. 30(2)).

Section 30(5) of the 2005 Act requires the arbitral tribunal, in all cases, to decide in accordance with the terms of the agreement and shall take into account the usages of the trade applicable to the transaction.

Prior to May 2018, the wording used in Sect. 30(4) differs from the wording of the Model Law, which provides that the arbitral tribunal shall apply the law determined by "the conflict of laws rules which it considers applicable". Section 30(4) omits the operative requirement of "which [the arbitral tribunal] considers applicable", but maintains the definite article "the" before "conflict of laws rules". As such, the linguistically accurate interpretation of Sect. 30(4) could only mean a reference to the conflict of laws rules of Malaysia,[58] which in most respects mirror the common law conflict of laws rules.[59]

At present, Sect. 30(4) provides that, "[f]ailing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable".

b. Determination as amiables compositeurs or ex aequo et bono

Section 30(4A) of the 2005 Act requires the arbitral tribunal to decide according to equity and conscience only if the parties have expressly authorized it to do so.

6. SETTLEMENT

Section 32(1) of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) provides that if during the arbitral proceedings the parties settle the dispute, the arbitral tribunal shall terminate the proceedings. If requested by the parties and not objected to by the arbitral tribunal, the arbitral tribunal shall record the settlement in the form of an award on agreed terms. An award made on agreed terms shall have the same status and effect as an award on the merits of the case.

58. Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration: An Asia Pacific Perspective* Cambridge University Press 2010).
59. *YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd* [1997] 4 CLJ 300.

In respect of formal requirements, an award on agreed terms is subject to the same formal requirements of a normal award. According to Sect. 33(3)(b) of the 2005 Act, no reasons need to be given where an award on agreed terms is concerned.

According to Rule 8(3) of the AIAC Mediation Rules, a mediator and/or co-mediator shall not, without the written consent of the parties, act as an arbitrator in any arbitral proceedings between the parties.

Section 32(3) of the 2005 Act provides that an award on agreed terms shall have the same status and effect as an award on the merits of the case. However, it is unlikely that setting aside procedures would be available against an agreed award since the parties would have implicitly agreed to certain features of the arbitration procedures such as the appointment of the arbitrator and fairness of the arbitration proceedings, which would otherwise be open to challenge.

7A. CORRECTION AND INTERPRETATION OF THE AWARD

a. Correction

Section 35 of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) provides that within thirty days of the receipt of the award, a party may request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical error or other error of similar nature. A party may also, within the same time frame, request the arbitral tribunal to give an interpretation of a specific point or part of the award. The arbitral tribunal may also correct any error on its own initiative within thirty days of the award. Where the award is not signed, it should be noted that such a document would not satisfy the formal requirements of an award and it is likely that Sect. 35 can be applied to remedy such omissions.

b. Interpretation

Section 35 of the 2005 Act also contains provisions allowing parties to request an interpretation of the award. Where an arbitral tribunal is requested to provide an interpretation, such interpretation shall form part of the award. The conditions under which an interpretation is to be provided are not stipulated under the 2005 Act or case law.

A correction or interpretation of an award is subject to the same formal requirements of an award, in that it shall be in writing, signed by the arbitrator(s) and state the date and the seat of arbitration. There is no requirement that it should be in the form of an additional award. In this respect, it should be noted that a request for an additional award can only be made where claims presented in the arbitral proceedings are omitted from the award. Under the 2005 Act, this is the only instance where an additional award may be made.

c. Timing

Section 35 provides that any request for clarification, interpretation or an additional award shall be made within thirty days of the receipt of the award, unless any other period of time has been agreed upon by the parties. A correction or interpretation is to be given within thirty days of the receipt of the request by the parties. However, the arbitral tribunal is given the discretion to extend the period of time where it takes the view that this is necessary.

7B. ADDITIONAL AWARD

In a situation where the tribunal has omitted to decide one of the issues submitted to them, the tribunal can render an additional award. However, this power is limited to claims which have already been presented to the tribunal but omitted from the award and as such, new claims cannot be raised.

Section 2 of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) does not specifically identify an additional award in the form of a correction or interpretation of an original award to be an "award" within the meaning of the 2005 Act. However, a reading of Sects. 33 and 35 of the 2005 Act suggests that an additional award qualifies as an award within the meaning of Sect. 2 of the 2005 Act. In this regard, Sect. 35(1) of the 2005 Act requires that the provisions of Sect. 33 apply to an additional award. Other than this, no particular form is stated for an additional award under the 2005 Act.

The 2005 Act is silent on the costs of rendering an additional award.

8. FEES AND COSTS

a. Costs in general

Costs of the arbitration under Sect. 44 of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) are generally understood to mean costs and expenses of the arbitration. The parties may agree as to how the arbitration costs are to be dealt with. In the absence of such agreement the arbitral tribunal has the discretion to determine which party bears the arbitration costs, the quantum of costs and whether to award costs on a solicitor-client basis.

b. Deposit

Arbitrators may (and usually do) require a deposit for their fees and expenses. The 2005 Act is silent on the taking of deposits but these are generally provided for under arbitral institution rules.

Arbitral institutions generally require a deposit to be made, usually subsequent to the commencement of arbitration.

The deposit is usually split between the parties. Where a party does not comply with the request for deposits, the arbitral tribunal or the arbitral

institution may inform the parties of the non-payment so that one or the other may make the required payment. If no payment is made, the arbitral tribunal may order the suspension or termination of the arbitration proceedings.

c. Fees of arbitrators

Arbitral institutions usually apply a schedule of fees in determining the fees of the arbitrator and the administrative costs of the institution. Most arbitral institutions apply a schedule of fees based on a scale system although it is possible for parties to agree to other systems, especially in *ad hoc* arbitrations.

The AIAC Arbitration Rules 2018 contains a simplified schedule of fees both for arbitrators and the AIAC's administrative costs.

For references to arbitrations under order of court pursuant to Sect. 24A of the Courts of Judicature Act 1964, the remuneration to be paid to an arbitrator shall be determined by the court.

d. Costs of legal assistance to parties

Where no directions are given under Sect. 44(1)(a)(iii) of the 2005 Act, the award is taxed on a party and party basis.

The party claiming the costs bears the burden of demonstrating that such costs have been incurred and are proper and reasonable in all the circumstances. Section 44(1)(a)(iii) gives the arbitral tribunal the discretion to direct costs to be taxed on a solicitor and client basis, which will apply in the absence of a direction under Sect. 44(1)(a)(iii).

Apart from having the costs taxed by the arbitral tribunal, a party may apply to the High Court under Sect. 44(1)(b) of the 2005 Act for the costs to be taxed where an arbitral tribunal has in its award directed that costs and expenses be paid by any party, but fails to specify the amount of such costs and expenses within thirty days of having being requested to do so.

e. Allocation of costs

Generally, the usual rule in Malaysia is that the award of costs follows the event, so that the successful party will be awarded its costs. The arbitral tribunal may however, pursuant to Sect. 44 of the Arbitration Act 2005, direct to and by whom and in what manner the costs or any part thereof shall be paid. In the absence of an award or additional award fixing and allocating the costs and expenses of the arbitration, Sect. 44(1)(c) of the 2005 Act provides that each party shall be responsible for its own legal and other expenses and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.

According to the Court of Appeal in *SDA Architects (sued as a firm) v. Metro Millenium Sdn Bhd*, an arbitral tribunal may depart from the general rule

that costs follow the event, as long as the arbitral tribunal provides reasons for doing so.[60]

9. NOTIFICATION OF THE AWARD AND REGISTRATION

For both *ad hoc* and institutional arbitrations, there is no requirement for the award to be registered or deposited with a court by the arbitral institute or tribunal.

10. ENFORCEMENT OF DOMESTIC AND INTERNATIONAL AWARDS RENDERED IN MALAYSIA (SEE ALSO CHAPTER VI – ENFORCEMENT OF FOREIGN ARBITRAL AWARDS)

a. General

Malaysia's enforcement regime follows the Model Law and United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

Section 38(1) of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) provides that, on an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign country State shall, upon being recognized and enforced under to Sect. 38 of the 2005 Act, be recognized as binding and be enforced by entry as a judgment in terms of the award or by action.

b. Procedure for enforcement

Section 38(2) provides that, in an application under Sect. 38(1), the applicant shall produce: (1) the duly signed authenticated original award or a duly certified copy of the award; and (2) the original arbitration or a duly certified copy of the agreement.

Section 38(3) provides that where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.

Section 38(4) indicates that for the purposes of the 2005 Act, a "foreign state" means a State which is a party to the New York Convention. Once an order giving permission to enforce is made, the party seeking to oppose enforcement has fourteen days from the date it was served with the order to make an application to set aside the award. The award will not be enforced until the expiry of fourteen days if no application to set aside is made.

Where enforcement is refused by the High Court, a party may utilize the appeals process. The grounds for refusal correspond with Art. 36 of the Model

60. [2014] 2 MLJ 627.

Law. See the comments below in respect of enforcement and enforcement of foreign arbitral awards.

c. Grounds for refusal of enforcement

Section 39 of the Arbitration Act 2005 sets out the grounds for refusing recognition or enforcement. These grounds correspond with those in Art. 36 of the Model Law and the New York Convention. The Federal Court in *CTI Group Inc v. International Bulk Carriers SpA* has confirmed that grounds for refusal are exhaustive, and an application to refuse recognition must fail (and consequently an award must be recognized and enforced) where none of the grounds set out under Sect. 39 are present.[61] Malaysian courts have generally adopted a narrow interpretation of public policy in dealing with setting aside applications, and it is likely that the same approach will be applied in refusing recognition or enforcement on the same grounds.

Decisions on enforcement are made by the High Court and are subject to the appeals process.

11. PUBLICATION OF THE AWARD

The default rule in Malaysia is that arbitral awards are not published or otherwise made available to the public, although parties may agree otherwise. This would however largely depend on the institutional rules adopted and the nature of the dispute – for example, it would appear that investment treaty arbitration awards under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention") are published and made available to the public. That said, there are no equivalent provisions under the Arbitration Act 2005 (see **Annex I** hereto) nor any of the institutional rules usually utilized in Malaysia.

Chapter VI. Enforcement of Foreign Arbitral Awards

1. ENFORCEMENT UNDER CONVENTIONS AND TREATIES

a. Treaty accession

Malaysia acceded to the New York Convention on 5 November 1985 and does not appear to have entered into any bilateral treaty on the enforcement of awards. Malaysia is also a party to the ICSID Convention, which entered into force on 14 October 1966. The Convention on the Settlement of Investment Disputes Act 1966 provides that ICSID Convention awards shall be binding

61. [2017] 6 AMR 344.

and be enforced in the same manner as if they are decrees or judgments of the High Court.

b. Procedure for enforcement

Section 38(1) of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) provides that, on an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign country State shall, subject to Sects. 38 and 29, be recognized as binding and be enforced by entry as a judgment in terms of the award or by action.

Section 38(2) states that, in an application under Sect. 38(1), the applicant shall produce: (1) the duly signed authenticated original award or a duly certified copy of the award; and (2) the original arbitration or a duly certified copy of the agreement. Section 38(3) provides that where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language. Section 38(4) provides that for the purposes of the 2005 Act, a "foreign state" means a State which is a party to the New York Convention.

c. Grounds for refusal of enforcement

Section 39 of the 2005 Act provides the grounds for refusing recognition or enforcement which correspond with Art. 36 of the Model Law and the New York Convention. The Federal Court in *CTI Group Inc v. International Bulk Carriers SpA* has confirmed that the grounds for refusal are exhaustive and an application to refuse recognition must fail (and consequently an award must be recognized and enforced) where none of the grounds set out under Sect. 39 are present.[62] Since the grounds for refusing recognition or enforcement correspond with the grounds for setting aside an award under Sect. 37 of the 2005 Act, the same comments apply under Sect. 38 as made above with respect to Chapter V.10 above.

Where a party satisfies one of the grounds, the High Court still has the discretion to allow recognition and enforcement if, for example, there was only a minor departure from agreed procedure. Otherwise there is little discretion to refuse recognition or enforcement where none of the grounds are established.

Court decisions on the enforcement of a foreign award are decisions of the High Court and are therefore subject to the appeals process within the Malaysian courts. A party may therefore apply to appeal against the decision of the High Court in enforcing an arbitral award or otherwise.

62. [2017] 6 AMR 344.

d. Court decisions on enforcement

In respect of enforcement under the New York Convention, the Court of Appeal in *Sri Lanka Cricket v. World Sport Nimbus Pte Ltd*[63] had decided that gazette notification under Sect. 2(2) of the New York Convention Act was necessary for the enforcement of a Convention award. This decision was eventually overruled by the Federal Court in *Lombard Commodities Ltd v. Alami Vegetable Oil Products Sdn Bhd*.[64] The Federal Court held that gazette notification under Sect. 2(2) of the New York Convention Act was not a mandatory requirement. In the absence of gazette notification, evidence could be led to show that a country is a contracting state.

2. ENFORCEMENT WHERE NO CONVENTION OR TREATY APPLIES

In the absence of an applicable convention or treaty, it would appear that it is still possible to enforce a foreign award in Malaysia under the Reciprocal Enforcement of Judgments Act 1958. An application may be made to enforce an award if the award has, pursuant to the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place. An application for enforcement is to be made by originating summons under Order 69 of the Rules of Court 2012 (see **Annex II** hereto).

3. RULES OF PUBLIC POLICY

Section 37 of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) provides that an award may be set aside if it is in conflict with the public policy of Malaysia where:

(1) the making of the award was induced or affected by fraud or corruption; or
(2) a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award.

Section 39 of the 2005 Act, which deals with the grounds for refusing recognition or enforcement, similarly provides that recognition or enforcement may be refused if the High Court finds that the award is in conflict with the public policy of Malaysia.

The Malaysian courts, in line with other UNCITRAL Model Law jurisdictions, have similarly adopted a narrow test in determining whether an award should be set aside on the ground that it is contrary to the public policy

63. [2006] 2 CLJ 316.
64. [2010] 2 MLJ 23.

of Malaysia. In *Kelana Erat Sdn Bhd v. Niche Properties Sdn Bhd*,[65] the High Court adopted the interpretation as to the substance and scope of "public policy" set down in the Singapore decision of *AJT v. AJU*.[66] 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. It will also have to be established 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".

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,*[67] where the High Court held that since there is a mandatory requirement of proof under Sect. 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 natural justice must therefore in almost all cases relate to a breach.

It should be noted that the Malaysian courts do not exercise their jurisdiction where the seat of arbitration is not in Malaysia. Thus, in *Twin Advance (M) Sdn Bhd v. Polar Electro Europe BV*,[68] the High Court held that Sect. 37 of the 2005 Act (Application for setting aside) 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 position is less clear where an international arbitration has its place of arbitration in Malaysia.

That said, there are a number of categories of civil disputes which have been held to be non-arbitrable. These include disputes relating to any act, duty or functions carried out by a statutory body in the exercise of its statutory powers,[69] and matters which fall under the scope of the summary determination procedure for defaults on a registered charge under the National Land Code.[70]

65. [2012] 5 MLJ 809.
66. [2010] 4 SLR 649.
67. [2010] 5 CLJ 83.
68. [2013] 7 MLJ 811.
69. *Pendaftar Pertubuhan Malaysia v. Establishmen Tribunal Timbangtara Malaysia & Ors* [2011] 6 CLJ 684.
70. *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.

Chapter VII. Means of Recourse

1. APPEAL ON THE MERITS FROM AN ARBITRAL AWARD

a. Appeal to a second arbitral instance

Section 37 of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) provides two main means of recourse against an award, which are contained in Sect. 37 (Application for setting aside). Prior to May 2018, recourse against an award could be had under Sect. 42 (Reference on questions of law).

The 2005 Act does not provide for appeals to a second arbitral tribunal. These may be provided for under institutional arbitration rules. To date, there do not appear to be any instances where an appeal was made to a second arbitral tribunal.

b. Appeal to a court

There is no appeals procedure *per se* which is applicable in respect of the merits of the award. Prior to May 2018, Sect. 42 of the 2005 Act allows reference to a court on questions of law arising out of an award which substantially affects the rights of one of the parties. This section has no equivalent under the Model Law and is also not in line with the legislation of other jurisdictions, with the closest equivalents being the similar procedures available in England and Wales, Hong Kong, Singapore and New Zealand. Unlike the now-repealed Sect. 42 of the Act, these other jurisdictions have in place a two-staged substantive filter procedure to prevent frivolous appeals and dilatory tactics by an aggrieved party to the arbitration. In *Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals*,[71] the Federal Court clarified that a court is not to sit in exercise of its appellate jurisdiction where the now-repealed Section 42 application is made. The High Court also posited that although questions of law may arise from findings of fact, the court is to adopt a restrictive approach in only determining questions of law and not questions of fact or a combination of questions of law and fact.

2. SETTING ASIDE OF THE ARBITRAL AWARD (ACTION FOR ANNULMENT, VACATION OF THE AWARD)

a. Grounds for setting aside

Section 37 of the Arbitration Act 2005 ("the 2005 Act", see **Annex I** hereto) provides for the grounds to set aside an award. The grounds are as follows:

71. [2018] 1 MLJ 1.

> "37(1) An award may be set aside by the High Court only if –
> (*a*) the party making the application provides proof that –
> (i) a party to the arbitration agreement was under any incapacity;
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
> (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
> (v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or
> (vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance within this Act; or
> (*b*) the High Court finds that –
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or
> (ii) the award is in conflict with the public policy of Malaysia."

An award is in conflict with the public policy of Malaysia where:

(1) the making of the award was induced or affected by fraud or corruption; or
(2) a breach of the rules of natural justice occurred (i) during the arbitral proceedings or (ii) in connection with the making of the award.

The now-repealed Sect. 42 of the 2005 Act provided that upon determining a question of law, the High Court may set aside the award, in whole or in part.

b. Procedure

An application for setting aside under Sect. 37 of the 2005 Act must be brought within ninety days from the date on which the party making the application had received the award, by way of an originating summons. Whether or not a party can be barred from raising jurisdictional issues would largely depend on the nature of the jurisdictional issue raised. Where the jurisdictional issue arises only out of the award itself, Sect. 18(3) of the 2005 Act would not apply. This would also appear to be the case where a failure to raise the issue under Sect. 18(3) of the 2005 Act could not in any case confer jurisdiction on an unlawfully constituted panel.

In respect of remission of an award to the arbitral tribunal, the position would appear to be that an application to set aside an award under Sect. 37 would preclude the High Court from remitting the award to the arbitral tribunal. However, Sect. 37(6) of the 2005 Act would suggest that a power

similar to remission can be exercised by the High Court by allowing the arbitral tribunal an opportunity to resume the arbitral proceedings, which will eliminate the grounds for setting aside. In contrast, an application to refer questions of law to the High Court under the now-repealed Sect. 42 of the 2005 Act could entail remission of the award to the arbitral tribunal.

Where an award has been set aside on grounds other than the invalidity of an arbitration agreement, it would appear that Sect. 37 of the 2005 Act does envisage the survival of the arbitration agreement between the parties as the High Court may opt to set aside the award in part.

c. Waiver

Applications to set aside an award cannot be excluded by the agreement of the parties as the provisions pertaining to setting aside are mandatory under the 2005 Act.

d. Effect of an award that has been set aside

Once an arbitral award is set aside, the court cannot remit the matter back to the tribunal to re-decide the matter. An arbitral tribunal is *functus officio* after it renders an award, and it cannot reconsider matters except where the court sets aside an award only in part.

There is to date no case law in which a Malaysian court has enforced an award that had been set aside.

3. OTHER MEANS OF RECOURSE

There are no other means of recourse against an arbitral award apart from those mentioned in Chapter VII above.

Chapter VIII. Conciliation / Mediation

1. GENERAL

In respect of conciliation / mediation, Malaysia has not adopted the UNCITRAL Model Law on International Commercial Conciliation.

The Mediation Act 2012 ("the 2012 Act", see **Annex III** hereto)) was enacted to promote and encourage mediation as a method of alternative dispute resolution in Malaysia and to facilitate the settlement of disputes in a fair, speedy and cost-effective manner. The 2012 Act provides a procedural framework of rules for mediation, guarantees confidentiality of mediation proceedings and allows any settlement agreement to be recorded as a consent judgment or a judgment of the court.

Mediation is not mandatory. However, the courts actively facilitate the settlement of civil disputes (either in part, as a whole, or even for interlocutory applications only) by promoting mediation at various stages of the dispute, i.e., pre-trial case management, trial, post-trial, and even on appeal. This is pursuant to the court's Practice Direction on Mediation (Practice Direction No. 4 of 2016) ("Practice Direction", see **Annex IV** hereto)

At present, the AIAC (formerly the KLRCA) offers mediation for both domestic and international disputes. The AIAC can be contacted at:

Asian International Arbitration Centre
Bangunan Sulaiman
Jalan Sultan Hishamuddin
50000 Kuala Lumpur
Malaysia
Telephone: +603 2271 1000
Facsimile: +603 2271 1010
Website: <www.aiac.world>

The Malaysian Mediation Centre ("MMC") is a body established in 1999 under the auspices of the Malaysian Bar Council, with the objective of promoting mediation as a means of alternative dispute resolution and providing a proper avenue for successful dispute resolution. It can be contacted at:

The Malaysian Mediation Centre (MMC)
13, 15 & 17 Leboh Pasar Besar
50050 Kuala Lumpur
Malaysia
Telephone: +603 2050 2050
Facsimile: +603 2026 1313
Website: <www.malaysianbar.org.my/malaysian_mediation_centre_mmc.html>

The Kuala Lumpur Court Mediation Centre ("KLCMC") is a free court-annexed mediation programme established in 2011 under the auspices of the Kuala Lumpur High Court, with the objective of promoting and providing free mediation with judges as mediators. The court-annexed mediation programme is integrated into new and existing cases filed in both the subordinate courts and the High Court in Kuala Lumpur. It can be contacted at:

Kuala Lumpur Court Mediation Centre
Level 2, Kuala Lumpur Court Complex
Jalan Sultan Abdul Halim Shah
(formerly Jalan Duta)
50506 Kuala Lumpur
Malaysia

Telephone: +603 6207 2094
Facsimile: +603 6207 2095
Email: <pmmkl@kehakiman.gov.my>

2. LEGAL PROVISIONS

Section 4 of the Mediation Act 2012 (see **Annex III** hereto) provides that parties may initiate mediation under the Act at any time and that mediation will not operate to stay, extend or prevent the commencement of any civil action in court or arbitration. The procedures for the commencement of mediation are contained in Sect. 5 and are briefly as follows:

(1) a person may initiate mediation by sending a written invitation to mediate to the person with whom he has a dispute;
(2) the written invitation must briefly specify the matters in dispute;
(3) upon receipt of the written invitation, the person with whom he has a dispute may accept the same in writing; and
(4) a mediation shall only be commenced if the person who initiates it has received the acceptance of the written invitation from the person with whom he has a dispute.

The written invitation is deemed to be rejected if the person initiating the mediation does not receive a reply from the person with whom he has a dispute within fourteen days from the date he sent the written invitation or such other period of time specified in the invitation.

Section 7 of the Mediation Act 2012 provides that the parties shall (where necessary, and with the assistance of an institution) appoint a mediator who possesses the relevant qualifications, special knowledge of or experience in mediation or satisfies the requirements of an institution.

Section 9 provides for the role of the mediator. This includes facilitating mediation, determining the method of mediation and suggesting options for the settlement of the dispute. In respect of confidentiality, Sect. 11(1) provides that the mediator shall conduct the mediation privately and he may meet with the parties together or separately. Section 11(3) goes on to provide that a mediator may end the mediation if he is of the opinion that further efforts at mediation would not contribute to a satisfactory resolution of the dispute between the parties. Confidentiality obligations are provided for in Sect. 15 which prohibits a person from disclosing any mediation communication. Section 16 declares that such communication is privileged and is not subject to discovery. Section 19 exempts a mediator from liability for any act or omission in the discharge of his function as mediator save where the act or omission is fraudulent or involves wilful misconduct.

Under Sect. 12, mediation shall conclude upon:

(1) the signing of a settlement agreement by the parties;
(2) the issuance of the mediator's written declaration that further efforts at mediation would not contribute to a satisfactory resolution of the dispute;
(3) the issuance of the parties' written declaration that the mediation is terminated; or
(4) the withdrawal from a mediation by death or incapacity of any party.

Where an agreement pertaining to a dispute has been reached, Sect. 13 stipulates that the parties shall enter into a settlement agreement. The agreement must be in writing, signed by the parties and authenticated by the mediator.

Section 14 provides that a settlement agreement is binding on the parties and the same may, if proceedings have been commenced in court, be recorded as a consent judgment or judgment before the court.

Chapter IX. Investment Treaty Arbitration

1. CONVENTIONS AND TREATIES

Malaysia is a party to the ICSID Convention. The ICSID Convention was ratified by Malaysia on 8 August 1966, and given effect through the Convention on Settlement of Investment Disputes Act 1966 (see **Annex V** hereto).

Malaysia is a party to a significant number of multilateral investment treaties and free trade agreements, most of which provide for arbitration of investment disputes usually under the ICSID Convention. These treaties are published on the website of the Ministry of International Trade and Industry (<www.miti.gov.my/>) and the United Nations Conference on Trade and Development's ("UNCTAD") Investment Policy Hub website (<http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/127#iiaInnerMenu>).

Malaysia is a signatory to at least seventy-one bilateral investment treaties, of which at least sixty-four are currently in force. In addition, Malaysia, as one of the ten Member States of the Association of South East Asian Nations ("ASEAN"), benefits from a number of bilateral and multilateral treaties entered into by the ASEAN bloc. A list of BITs to which Malaysia is a party are published on the website of the Ministry of International Trade and Industry (<http://www.miti.gov.my/index.php/pages/view/771>) and UNCTAD's Investment Policy Hub website (<http://investmentpolicyhub.unctad.org/IIA/CountryBits/127>).

Malaysia employs a Model BIT introduced in 1998 (see **Annex VI** hereto).

2. INVESTMENT ARBITRATION

To date, Malaysia has been involved in three investment arbitrations under the auspices of ICSID – in 1994, 1995 and 2005.

In 1994, in *Gruslin v. Malaysia (I)*, a claim filed under the BLEU (Belgium-Luxembourg Economic Union)-Malaysia BIT (1979) was amicably settled.[72]

In 1999, in *Gruslin v. Malaysia (II)*, a claim was filed under the BLEU (Belgium-Luxembourg Economic Union)-Malaysia BIT (1979).[73] In November 2000, the claimant's claim was dismissed for want of jurisdiction under Art. 25(1) of the ICSID Convention and Art. 10(1) and (2) of the BIT concerned.

In 2005, in *Malaysian Historical Salvors Sdn Bhd v. Malaysia*, a claim filed under the Malaysia-UK BIT (1981) arose out of the alleged non-payment of amounts owed to a claimant from the sale of items recovered from the cargo of a ship that sank in Malaysian waters pursuant to a salvage contract concluded between the British investor and Malaysia.[74] The investment concerned rights under a contract entered into by the British investor with Malaysia for the location and salvage of a British vessel's cargo which sank in 1817, and a subsequent contract concerning the auction of potentially recovered items. In May 2007, the claimant's claim was dismissed for want of jurisdiction under Art. 25(1) of the ICSID Convention. In February 2009, the tribunal's award on jurisdiction was annulled.

In 2017, a claimant issued a Notice of Dispute against Malaysia under the provisions of the 1987 ASEAN Agreement for the Promotion and Protection of Investments.

There do not appear to have been any reported decisions on the enforcement of investment awards in Malaysia.

3. NATIONAL INVESTMENT LEGISLATION

Malaysia's foreign investment legislation includes the Promotion of Investments Act 1986, which provides for the promotion by way of relief from income tax the establishment and development in Malaysia of industrial, agricultural and other commercial enterprises, for the promotions of exports and for incidental and related purposes, as well as the Safeguards Act 2006, which provides for the investigation and determination of safeguard measures on products imported into Malaysia and other matters connected therewith.

Malaysia's foreign investment legislation does not provide for dispute settlement, as these disputes would be governed by the provisions of the applicable BIT.

72. ICSID Case No. ARB/94/1.
73. ICSID Case No. ARB/99/3.
74. ICSID Case No. ARB/05/10.