AN INTERVIEW WITH
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Arbitration in Malaysia: Where Are We?

CECIL ABRAHAM & PARTNERS
ADVOCATES & SOLICITORS

BIOGRAPHY

Tan Sri Cecil Abraham is the senior partner at Cecil Abraham & Partners. His career at the bar spans 50 years. He has over 250 reported decisions of note to his name and is widely regarded by his peers and clients alike as one of Malaysia's leading counsel, and known to be devastatingly effective in court. His practice covers numerous areas including corporate and commercial; environment; banking and securities; insurance; competition; and arbitration. He is regularly appointed as an arbitrator in domestic and international arbitration, and is the only Malaysian to be regularly appointed in investment treaty disputes.

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What legislation applies to arbitrations in your jurisdiction? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration?

There are two Acts in force in Malaysia, namely the Arbitration Act 1952 ("1952 Act") and the 2005 Arbitration Act ("the Act"). The Act is based on the Model Law and the New Zealand Arbitration Act 1996. The 1952 Act only applies to arbitrations commenced prior to 15th March 2006.

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

Section 3 of the Act makes the main distinction between international and domestic arbitrations and sets out the territorial limits and scope of the Act. This section incorporates the provision for opting-in and opting-out of Parts I, II and IV of the Act in respect of domestic and international arbitrations where the seat of the arbitration is in Malaysia. There is no equivalent provision to Section 3 of the Act in the 1952 Act. The 1952 Act applies both to domestic and international arbitrations.

In your practice when dealing with domestic arbitration, have you experienced more ad hoc or institutional arbitrations? If so, which arbitral institution(s) is/are commonly used to resolve commercial disputes in your jurisdiction? In your opinion, how effective are the products and services offered by the named institution(s)?

In the context of domestic commercial arbitrations, many cases have been subject to institutional arbitration rather than ad hoc arbitrations. Most of the domestic arbitration cases have been under the auspices of the Kuala Lumpur Regional Centre for Arbitration ("KLCRA"), now known as the Asian International Arbitration Centre ("AIAC"). The product and services offered by the AIAC have been effective.

What, if any, requirements must be met by an individual to become an arbitrator in your jurisdiction? Are there any barriers for foreign practitioners to serve as arbitrators or parties' representatives in your jurisdiction?

Neither Act imposes any special qualification requirements on arbitrators. Section 13 of the Act provides that no person shall be precluded by reason of nationality from acting as an arbitrator unless there is an agreement to the contrary. Arbitrators also do not need legal training. Parties may contractually agree that arbitrators shall have specific qualifications by specifying this in their arbitration agreement or clause. The decision of the High Court in *Salutory Avenue (M) Sdn Bhd v Malaysia Shipyard & Engineering Sdn Bhd & Anor* suggests that as a matter of a *minimum standard*, an arbitrator must possess knowledge of the subject matter of the dispute namely, the shipbuilding industry.[1]

The High Court in *Sebiro Holdings Sdn Bhd v Bhag Singh & Anor* held that the qualification of an arbitrator cannot be challenged in the absence of a clause to the contrary.[2]

Section 37A of the Legal Profession Act 1976, has no restrictions for international arbitrators and lawyers to participate in arbitral proceedings in Malaysia.

The AIAC prefers that the arbitrators listed on its panel to have sufficient arbitration training. Arbitrators are encouraged to be Fellows of the Chartered Institute of Arbitrators and a number of the arbitrators are Chartered Arbitrators.

[1] *[1999] 7 CLJ 514.*

[2] *[2014] 11 MLJ 761.*

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Does the law in your jurisdiction consider certain dispute as non-arbitrable? If so, what disputes are non-arbitrable?

Arbitration agreements under the Act are not limited to commercial disputes unlike the Model Law. Section 9(1) of the Act provides that an arbitration agreement may include references which arise from a relationship "whether contractual or not".

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

The courts have held that fraud[3], civil disputes[4] relating to acts, duty or functions carried out by a statutory body and tortious claims [5], are arbitrable.

The Federal Court[6] has held that matters falling within the scope of the summary determination procedure for defaults on a registered charge under the National Land Code 1965, are non-arbitrable on public policy considerations.

The notion of arbitrability of a dispute depends on the construction that is to be given to the arbitration clause. The Malaysian courts[7] have endorsed the approach in *Fiona Trust & Holding Corporation and others v Privalov and others*[8].

What is the procedure for commencing arbitration in your jurisdiction? Does the law provide default rules governing the commencement of arbitral proceedings? Is there a period of limitation that parties should be aware of?

The parties are free to agree on the procedure to be followed by the tribunal provided the procedure does not contravene any provisions of the Act. The parties may choose institutional arbitration rules or an ad-hoc arbitration.

In the absence of procedural rules, the tribunal can conduct proceedings in a manner it considers appropriate. The procedure is laid out in Sections 20 to 29 of the Act and it is decided by the arbitrator subject to any agreements that may have been reached by the parties and is subject to the overriding rules of fairness and natural justice.[9]

Hearings are held orally unless parties agree to a document-only arbitration. The tribunal must hold an oral hearing if requested by the parties.

Section 25 of the Act sets out the procedure for identifying the issues in dispute. The parties normally would file the Points of Claim followed by Points of Defence and Counterclaim and other consequential pleadings. The tribunal can terminate proceedings if a Claimant fails to deliver the pleadings within the time stipulated. If the Respondent fails to deliver a defence or fails to appear at the hearing or produce documents, the tribunal may proceed with the arbitration and hand down an Award.

Each party must be notified of the hearing so that they can effectively prepare their case and make effective submissions. The arbitration should not proceed if one of the parties is not aware of the hearing.

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[3] *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2015] 5 AMR 30.
[4] *Pendaftar Pertubuhan Malaysia v. Establishment Tribunal Timbangtara Malaysia & Ors* [2011] 6 CLJ 684.
[5] *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394.*
[6] *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.
[7] *KNM Process Systems Sdn Bhd v Mission Newenergy Ltd [2013] 1 CLJ 993; The Government of India v Cairn Energy India Pty Ltd & Ors [2014] 9 MLJ 149; RUSD Investment Bank Inc & Ors v Qatar Islamic Bank & Ors [2015] LNS 231.*
[8] *[2007] UKHL 40*
[9] See Amalgamated Metal Corporation Ltd v Khoon Seng Co [1977] 2 Lloyd's Rep 310 at 317.

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There is also no requirement that the parties need to be represented by legally qualified persons and international lawyers can participate in arbitrations in Malaysia, save for the state of Sabah where there are restrictions on non-Sabah advocates.

Section 30 of the Limitation Act 1953 and any other written law relating to the limitation of actions applies to arbitrations. An arbitration agreement can include a clause requiring a dispute to be referred to arbitration within a specified period.

What is the approach of the local courts in your jurisdiction towards international arbitration proceedings? Do the courts intervene to assist arbitration proceedings? Is there a period of limitation that parties should be aware of?

Malaysia continues its growth as a centre for arbitration. The Act provides a coherent modern legislative framework in line with international norms and best practices. Malaysia has all the components in place to take off as a centre for international arbitration. Recent decisions of the country's courts underscore the fact that the Malaysian judiciary is now pro-arbitration.

Given the current arbitral landscape and the progressive and innovative approach taken by the AIAC in promoting Malaysia as a cost-efficient centre for dispute resolution, the country is suitably poised to tap into the significant growth of international arbitration within the member countries of Asean and the Asia-Pacific region.

Section 8 of the Act expressly provides that no court may intervene in any matter governed by the Act, unless otherwise provided. The Malaysian courts do not have any inherent power to take over or intervene in arbitral proceedings. This encapsulates the principles of party-autonomy and minimalist intervention by courts of law[10] and the courts have re-emphasized the principles that when parties to arbitration, a court of law should be slow to interfere in the arbitration. The Malaysian courts are also taking a strict approach to intervention in arbitral proceedings in view of the provisions of Section 8 of the Act.[11]

The court can interfere if it involves obvious injustice or where the Director of the AIAC has not made an appointment within 30 days from the request, where the parties have applied to the High Court for an appointment under section 13(7) of the Act.

The Limitation Act 1953 and any other written law relating to the limitation of actions applies to arbitrations.[12]

What are the grounds to challenge arbitral awards in your jurisdiction's local courts? What is the judiciary's approach to determining whether or not to grant a challenge to an arbitral award?

There are no appeals procedure against an award made in Malaysia under the Act. The only recourse is to set aside the award which must be made within ninety days of receipt of the award. The grounds for setting aside an award are set out in Section 37 of the Act namely the award is contrary to the public policy of Malaysia, fraud, or a breach of the rules of natural justice. Section 37 has been interpreted by our courts narrowly in the interests of ensuring finality and conclusiveness of the award made by a tribunal.

The courts have adopted a narrow test in determining whether an award should be set aside on the grounds of public policy. The error has to be of such a nature that the enforcement of the award would "shock the conscience", be "clearly injurious to the public good" or would contravene "fundamental notions and principles of justice". The other ground would be where there has been a breach of natural justice.

[10] *Cobrain Holdings Sdn Bhd v GDP Special Projects Sdn Bhd [2010] 1 LNS 1834*

[11] *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor [2008] 3 MLJ 872*

[12] *Section 30, Limitation Act 1953.*

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An application to set aside an award should be made within ninety days of the date of the award.

The jurisdiction of an arbitral tribunal is often denied by a party to an arbitration proceeding. Does your jurisdiction recognize the principle of *kompetenz-kompetenz*?

The doctrine of *kompetenz-kompetenz* applies in Malaysia pursuant to Section 18(1) of the Act, which corresponds with Article 16 of the Model Law. There are two crucial aspects to the doctrine, namely, the tribunal can rule on its own jurisdiction without the need for support from the court and the courts need not determine the issue before the tribunal has had a chance to consider it.

The jurisdiction of the tribunal includes any objections to the existence or validity of the arbitration agreement and two types of plea can be made to the tribunal pursuant to Section 18 of the Act namely, the tribunal does not have jurisdiction and it is exceeding its authority. An appeal must be lodges within 30 days to the High Court, hence the tribunal's decision on the issue of jurisdiction is not final.

In *TNB Fuel Services Sdn Bhd v China National Coal Group*[13], the Court held that a tribunal could hear and determine jurisdictional challenge, which is consistent with the general attitude of the courts to lean in favour of arbitration.

While an appeal is pending, the tribunal can continue the arbitral proceedings and make an award.[14] The courts are unlikely to order a stay of the arbitral proceedings unless the tribunal has no jurisdiction.

Are the courts and arbitral tribunals entitled to award interim relief in your jurisdiction? If so, what types of relief are available to each?

The powers of the court to order interim measures are set out in Section 11 of the Act which was amended in 2018. A party may either before or during arbitral proceedings, apply to the High Court for the following orders:

(a) Maintain or restore the status quo pending the determination of the dispute;
(b) Take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process;
(c) Provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of an arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;
(d) Preserve evidence that may be relevant and material to the resolution of the dispute; or
(e) Provide security for the costs of the dispute.

Section 19 of the Amended Act provides that unless agreed otherwise by the parties to the arbitration, a tribunal can grant interim measures which are as follows:-

(a) Maintain or restore the status quo pending the determination of the dispute;
(b) Take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;
(c) Provide a means of preserving assets out of which a subsequent award may be satisfied;
(d) Preserve evidence that may be relevant and material to the resolution of the dispute; and
(e) Provide security for the costs of the dispute.

Interim measures should be applied to the tribunal before an application is made to the High Court. A party may, when an application for interim measures is refused by the tribunal, make a further application pursuant to Section 11 to the High Court.

Your jurisdiction is a party to Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). Do the grounds for refusing enforcement of an arbitral award in your jurisdiction differ from

[13] *[2013] 4 MLJ 857*

[14] *Section 18(9) of the Act.*

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those specified in the New York Convention? Is there any limitation period applicable to enforce a foreign arbitral award in your jurisdiction?

Sections 38 and 39 deal with recognition and enforcement of foreign arbitral awards and the grounds for refusing same. These sections apply both to awards sought to be enforced in Malaysia in respect of domestic and foreign awards. These provisions mirror Articles 35 and 36 of the Model Law and the provisions of the New York Convention.

Section 38 sets out the procedure to enforce a foreign award[15] and allows for awards made in an international arbitration with a seat in Malaysia to be enforceable.

Section 39 deals with grounds for refusing recognition or enforcement, which grounds are exhaustive. The courts adopt a narrow interpretation of 'public policy' in setting aside applications and the same applies in respect of Section 39 of the Act.[16]

There is no decision in Malaysia which directly addresses the notion of a passive remedy in the event a party does not raise a plea of no jurisdiction.

Section 38 is a 'recognition procedure' to convert an arbitration award to a judgment and can only be done by the person holding an arbitration award and it is impermissible to argue the merits. The arguments relating to merits are only permitted pursuant to Section 39.

International arbitral awards rendered outside the Malaysian jurisdiction are enforceable if they are issued from states which are parties to the New York Convention.

The Limitation Act 1953 and any other written law relating to the limitation would apply.

What are the current trends or issues affecting the use of arbitration in your jurisdiction? Would you describe your jurisdiction as pro-arbitration in nature? Why or why not?

Arbitration is popular in Malaysia. Many of the arbitrations that take place in Malaysia, appear to be construction based although there are also a significant number of commercial arbitrations. A current topic amongst practitioners is whether there should be appeals to the High Court on a point of law as provided in the previous Section 42 of the Act which has been repealed in 2018. There is a call for reinstating the said provision with a filter mechanism. It remains to be seen whether Section 42 will be revisited.

No Director of the AIAC that has been appointed since the demise of the previous Director. This has an impact on the registering of arbitrations by the AIAC as well as an impact on the appointment of arbitrators and adjudicators given the statutory provisions in place under the Act and the Construction Industry Payment and Adjudication Act 2012. Steps should be taken to appoint a Director on an urgent basis otherwise AIAC as an arbitral institution is likely to be impaired.

It is hoped that given Malaysia is a pro-arbitration jurisdiction that remedial steps will be adopted soon to ensure the AIAC is able to reach its full potential as an attractive arbitral institution and Malaysia as a premier arbitration jurisdiction within Asia.

In your opinion, is there a shift from Western jurisdictions to Eastern jurisdictions with

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[15] The way such an application is to be made is set out in Order 69 rule 8(1) of the Rules of Court 2012. The application may be made on an ex parte basis. In Tune Talk Sdn Bhd v Padda Gurtaj Singh [2019] MLJU 67, the Court of Appeal held that the provisions of Sections 38 and 39 are exhaustive and that there is no room for any other substantive requirements to be satisfied for the recognition and enforcement of an arbitral award. The Court of Appeal further held that the provisions of Order 69 rule 8(1) of the Rules of Court 2012 merely set out the procedural means to obtain enforcement and recognition of the arbitral award. An act of non-compliance with the procedural requirements is therefore not fatal.

[16] See Kelana Erat Sdn Bhd v Niche Properties Sdn Bhd [2012] 5 MLJ 809 and the discussion under section 'H. Challenge and Other Actions against the Award' above.

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regards to the preferred seat of arbitration? If so, how should ASEAN countries capitalize on this opportunity?

I do not see a truly major shift from Western jurisdictions to Eastern jurisdictions. There is no doubt that there has been in recent times a considerable number of arbitrations in Singapore, Hong Kong and to a limited extent, in Malaysia but it cannot be denied that most of the major commercial arbitration disputes and investment treaty claims are seated in Europe and North America. In so far as ASEAN countries are concerned, the only way in which they can take steps to attract arbitrations to this part of the world, is for (i) the incorporation of appropriate local legislation to support arbitration as an alternative to domestic litigation before the national courts, (ii) national courts through their decisions to establish jurisprudence that is arbitration–friendly, (iii) there to be clear support from the business community for arbitration and (iv) ultimately, financial and political backing from the relevant Governments within the region in support of arbitration as an alternative or preferred dispute resolution mechanism. Not all countries with Asia and for that matter ASEAN are strictly Model Law countries. It may be opportune to ensure harmony in the conduct of arbitration disputes and the enforcement of arbitral awards across the region that the Model Law is consistently adopted. The economic benefits of such an approach would be beneficial to the ASEAN countries as a whole, in so far as commercial arbitrations are concerned.

How open is your jurisdiction to foreign young dispute resolution professionals?

Malaysia has encouraged young dispute resolution professionals in that there are several organisations, which cater to the needs of the under-40 age bracket of practitioners. For instance, there is the Malaysian chapter of the Chartered Institute of Arbitrators ("CIArb"), the Malaysian Institute of Arbitrators ("MIArb") and also the Asian International Arbitration Centre ("AIAC"), which have a dedicated forum for younger practitioners to express themselves.

It is hoped that these forums if properly managed and run will help develop depth in expertise in Malaysia in so far as arbitration counsel and arbitrators are concerned, which at present is somewhat lacking.

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