KNOWLEDGE & INSIGHTS

Judicial Approach to the Application and Construction of the Arbitration Act 2005 in Malaysia: Section 8

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Over the past few decades, Malaysia has sought to develop a refined and efficient system for alternative dispute resolution. Today, Malaysia has a relatively robust arbitration ecosystem. This article is part of a series that considers how the courts in Malaysia have construed and interpreted sections 8, 37 and 42 of the Arbitration Act 2005 (the 2005 Act) and, in particular, focuses on the judicial approach to minimal court intervention set out in section 8.[1]

PARTY AUTONOMY

The courts recognise that party autonomy is a hallmark of arbitration. This principle was given statutory force by way of the original wording of section 8 of the 2005 Act, which was based on article 5 of the United Nations Commission of International Trade Law (UNCITRAL) Model Law (the Model Law). Section 8 was initially worded as follows: "Unless otherwise provided no Court shall intervene in any of the matters governed by this Act."

This section was construed by Madam Justice Mary Lim (as she then was) in AV *Asia Sdn Bhd v Pengarah Kuala Lumpur Regional Centre for Arbitration & Anor*,[2] in the following manner:

> *"[I]t is quite evident that the role of the court has been spelled out early in s. 8 [of the 2005 Act] which provides that: Unless otherwise provided, no Court shall intervene in any of the matters governed by this Act.*
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> *[11] This is intentional and deliberate. This reflects the policy and general principle of non-intervention; respecting party autonomy, and protecting parties who have chosen arbitration from unnecessary delay and expense. This provision shows support for arbitration."*

[1] For the first article in the series, see "Judicial approach to application and construction of Arbitration Act 2005 in Malaysia: introduction".
[2] [2013] 10 CLJ 115.

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The current section 8 of the 2005 Act was amended in 2011 in the following manner: "No Court shall intervene in matters governed by this Act except where so provided in this Act."

The Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Restam Melayu Pahang and other appeals*[3] construed section 8 of the 2005 Act in the following manner:-

> *"The AA 2005 is devoid of a provision in the words of s 81(2) of the UK Arbitration Act 1996. But the AA 2005 is nonetheless clear that 'No court shall intervene in matters governed by this Act, except where so provided in this Act'. Pertinent to 'where so provided in this Act', the AA 2005 provides for court intervention in the matters stated in ss 10, 11, 13(7), 15(3), 18(8), 29, 37, 41, 42, 44(1), 44(4), 45, and 46 of the AA 2005. 'Where a party seeks intervention is one of those situations, the court is permitted to intervene only in the manner prescribed by the model law, and in the absence of any express provision the court must not intervene at all . . . .*
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> *But ... in situations expressly regulated by the Act, the courts should only intervene where so provided in the Act ...' (LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal [2012] SGCA 57 per Sundaresh Menon JA, as he then was, delivering the judgment of the court). Since the setting aside of an award is a matter governed by the AA 2005, the court is permitted to set aside an award only in manner prescribed by the AA 2005. The court is not permitted to set aside an award in manner not prescribed by the AA 2005."*

Other decisions of the Federal Court of Malaysia, the Court of Appeal of Malaysia, and the High Court of Malaya[4] also recognise the principle of party autonomy and the concept of non-intervention by the courts as embodied in section 8 of the 2005 Act. The purpose of enacting section 8 of the 2005 Act was to ensure that the courts in Malaysia adopt a minimalistic approach to arbitration where the arbitrators shall remain the sole determiners of fact and the findings of the arbitrators on legal principles should not be interfered with unless the decision is perverse.

[3] [2018] 1 MLJ 1.

[4] See:

- *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 9 CLJ 1;
- *Jan De Nul (Malaysia) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 1 CLJ 1;
- *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617;
- *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor* [2008] 3 MLJ 872;
- *Magnificient Diagraph Sdn Bhd v JWC Ariatektura Sdn Bhd* [2009] MLJU 583;
- *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporation Sdn Bhd* [2009] MLJU 793;
- *Twin Advance (M) Sdn Bhd v Polar Electro Europe BV* [2013] 7 MLJ 811;
- *Kembang Serantau Sdn Bhd v Jeks Engineering Sdn Bhd* [2016] 2 CLJ 427; and
- *Emerald Capital (Ipoh) Sdn Bhd v Pasukhas Sdn Bhd & Anor* [2019] MLJU 181.

EXTENSIONS OF TIME

The issue of whether common law concepts and inherent jurisdiction have a role to play in the light of the enactment of section 8 of the 2005 Act was dealt with in:

- *JHW Reels Sdn Bhd v Syarikat Boros Shipping Sdn Bhd*;[5]
- *Albit Resources Sdn Bhd v Casaria Construction Sdn Bhd*;[6] and
- *Kembang Serantau Sdn Bhd v Jeks Engineering Sdn Bhd*.[7]

In Kembang Serantau, the High Court took a narrow approach, interpreting section 8 of the 2005 Act strictly, and held that although the applicant was late by only one day in filing its application under section 37 of the 2005 Act to set aside an arbitral award, the Court did not have the power to extend time.

In *JHW Reels Sdn Bhd v Syarikat Boros Shipping Sdn Bhd*,[8] the High Court followed the Singapore High Court's decision in *ABC Co v XYZ Ltd*[9] to say that there was no room to extend time. Mr Justice Mohamad Ariff Yusof (as he then was) in *JWH Reels* held as follows:

> *"Having considered the submissions and the provisions in our Arbitration Act, I tend to be of the view that on a proper reading of s. 37(4) the time limit imposed is mandatory. This view accords with the generally accepted view that under the Model Law, the time limit is strict and express power must be given under the law itself before the court can extend time. This view also accords with the principle of minimal intervention by the courts of law as strongly underlined in our s. 8 of the Act. Support for this strict reading can be found within the four corners of s. 37 itself . . . .*
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> *In reaching this court's decision in favour of a strict reading of s. 37(4) and exclusion of a power to extend time, I have also taken note of the persuasive High Court of Singapore decision in ABC Co v. XYZ Ltd [2003] SGHC 107; [2003] 3 SLR(R) 546 . . . .*
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> *I do not see why the Malaysian approach to the same broad issue should be any different, particularly in light of the express wording of our own statutory provision which I have alluded to earlier."*

The time limit under section 37(4) of the 2005 Act is not only mandatory but is also not amenable to any judicial extension of time. That said, there exists an outlier of a decision in the form of the Court of Appeal's judgment in *Government of the Lao People's Democratic Republic v Thai-Lao Lignite Co, Ltd* ("TLL"), *A Thai Company & Anor*,[10] which took the position that the time limit set out under section 37(4) of the 2005 Act can be extended by a Malaysian court by way of the Rules of Court – specifically, order 3 rule 5 of the Rules of the High Court 1980 (now order 3 rule 5 of the Rules of Court 2012).

The decision in *Thai-Lao Lignite* is arguably incorrect in law as the Court of Appeal failed to consider the effect of section 8 of the 2005 Act in seeking to assert that the Court could extent time by reference to a subsidiary legislation in the form of the Rules of Court 2012 when the provisions of section 37 of the 2005

[5] [2013] 7 CLJ 249.
[6] [2010] 3 AMR 721; [2010] 7 CLJ 785.
[7] [2016] 1 AMR 261 (upheld on appeal).
[8] [2013] 7 CLJ 249.
[9] [2003] SGHC 107.
[10] [2011] 1 LNS 1903.

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Act do not contain any express power to extend time to file an application to set aside an arbitral award beyond the prescribed time limit.

In fact, the High Court in *Kembang Serantau* alluded to the *per incuriam* nature of the decision in *Thai-Lao Lignite as follows*:

> *"[21] With respect, the construction of sub-s. 37(4) depends to a large extent, the approach the courts wish to adopt when dealing with arbitration and arbitration related matters. That construction and interpretation also depends on how the court views the relevance and role of Uncitral Model Law. In the last ten years since its enactment, the courts have acknowledged and recognised that Act 646 takes its roots from the Uncitral Model Law despite the fact that Malaysia has yet to accede to that Convention. The inclusion of particular regimes for domestic arbitrations, that is, Part IV of the Act, which may be adopted or opted in for international arbitrations does not affect the approach taken. The inclusion is a drafting tool of legislating for both domestic and international arbitrations in a single statute as opposed to separate legislations for the two; as is the case with certain jurisdictions such as Singapore and India.*
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> *[22] On this question of how the courts are to receive Model Law, the Court of Appeal observed that the High Court had:*
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> *... relied so much on the UNCITRAL Model Law in coming to his decision that the prayer for extension of time in arbitration matter ought not to be condoned by the Court. He expressed his view that "it is trite that the Arbitration Act 2005 has prima facie accepted the UNCITRAL Model Law and the judicial sentiment here as well as other countries which have adopted the same is inclined towards the jurisprudence relating to 'minimum intervention of the Court' in matters governed by the Act".*
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> *31. With respect, we are not in agreement with the learned judge on this point. Our view is that, even though the Malaysian Arbitration Act 2005 had prima facie accepted the UNCITRAL Model Law, it does not in any way take away the powers of the Court in dealing with any application for extension of time. There is no express provision to that effect, the Model Law, particularly Article 34(2) thereof, provides for the grounds under which an arbitral award may be set aside by the Court. They relate to the substantive application to set aside the award. There is no mention about an extension of time to file the said application. Even section 37 of the Arbitration Act 2005 does not expressly prohibit the powers of the Court to extend time in appropriate case.*
>
> *[23] It is observed that the Court of Appeal came to the conclusion that the court retains its powers to extend time because there are no express provisions in Act 646 prohibiting the exercise of the court's powers on the same. It would appear that s. 8 of the Act 646 was not brought to the Court of Appeal's attention. Neither was it raised in the High Court. If it was raised, I am certain that it would have made a material difference. It certainly did in the third case."*

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In the premises, the Court of Appeal's decision in *Thai-Lao Lignite*[11] is not only unpersuasive but is also irreconcilable with the scheme of the 2005 Act. In *Kembang Serantau*, Madam Justice Mary Lim (as she then was) held that "[t]he appearance of the words 'may not' in s. 37(4) could not reasonably be read as denoting merely a directory requirement". In this vein, it cannot be said that time can be extended by the Court. The decision of the High Court in *Kembang Serantau* was upheld by the Court of Appeal. Leave to appeal to the Federal Court was subsequently refused.[12]

Due cognisance ought to be given to the fact that the approach adopted in *JHW Reels* and in *Kembang Serantau* is very much consistent with the approach in Hong Kong by reference to the decisions handed down by Madam Justice Mimie Chan in *A and A Other v D*[13] and *AW v PY*.[14]

[11] The decision in *Thai-Lao Lignite* was not followed by the *High Court in Triumph City Development Sdn Bhd v Kerajaan Negeri Selangor Darul Ehsan* [2017] 1 LNS 511. The appeal arising therefore filed by the Kerajaan Negeri Selangor Darul Ehsan was dismissed by way of Court of Appeal Civil Appeal No. B-01(IM)(NCC)-48-02/2017.
[12] Upheld on appeal in *Kembang Serantau Sdn Bhd v Jeks Engineering Sdn Bhd* (Court of Appeal Civil Appeal No. W-02(IM)(c)-1769- 10/2015) (unreported). Leave to appeal was refused in *Kembang Serantau Sdn Bhd v Jeks Engineering Sdn Bhd* (Federal Court Civil Application No. 08-169-04/2016(W) (unreported).
[13] [2020] HKCU 4001.
[14] [2022] HKCFI 1397.

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COMMENT

Arising from the above, in the light of the philosophy of the Model Law, the Malaysian courts may now avoid reliance on the inherent jurisdiction and hence, the pre-Model Law philosophy of the High Court in *Sarawak Shell Gas Sdn Bhd v PPES Oil and Gas Sdn Bhd*[15] should no longer be followed in view of the provisions of section 8 of the 2005 Act. The courts ought also not follow the common law concept of error, "of law on the face of the record", which was deeply entrenched in Malaysian arbitration law in light of the decision in *Majlis Amanah Rakyat v Kausar Corporation*.[16] The better view was expressed in the decision of Madam Justice Nallini Pathmanathan (as she then was) in *Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd*,[17] which was adopted by the Court of Appeal in *Kerajaan Malaysia v Perwira Bintang*.[18] As such, the doctrine of error of law on the face of the record would no longer be applicable by the Malaysian courts. This concept was endorsed in part by the Federal Court in *Far East Holdings*.

The principle of minimalistic court intervention becomes apparent especially when dealing with challenges to arbitration awards. The approach of the courts has been to preserve the integrity of the arbitral process unless there is patent injustice wherein a number of authorities have followed this approach.[19]

The general non-interventionist approach is captured in the judgment of the Federal Court in *Government of India v Cairn Energy India Pty Ltd & Anor*[20] where the Federal Court held as follows at paragraph 53:

> "*[53] And as Scrutton LJ put it '... if you refer a matter expressly to the arbitrator and he makes an error of law you must take the consequences; you have gone to an arbitrator and if the arbitrator whom you choose makes a mistake in law that is your look-out for choosing the wrong arbitrator; if you choose to go to Caesar you must take Caesar's judgment' (see African & Eastern (Malaya), Ltd v White, Palmer & Co, Ltd (1930) 36 LI L REP 113; cited with approval by the Court of Appeal in Dato' Teong Teck Kim & Ors v Dato' Teong Teck Leng [1996] 1 MLJ 178; [1996] 2 CLJ 249).*"

These decisions of the Malaysian courts indicate that the national courts have embraced the doctrine of a minimalistic or non- interventionist approach to arbitration. This bodes well as Malaysia attempts to promote itself as a preferred arbitration seat or venue in which the national courts are generally perceived as being supportive of the arbitration ecosystem as a whole.

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[15] [1998] 2 AMR 1914; [1998] 2 MLJ 20, CA.
[16] [2011] 3 AMR 315.
[17] [2014] 1 AMR 253.
[18] [2014] AMEJ 1550; [2015] 1 CLJ 617.
[19] See:

- *Kerajaan Malaysia v Perwira Bintang* [2014] AMEJ 1550; [2015] 1 CLJ 617;
- *Government of the Lao People's Democratic Republic v Thai-Lao Lignite Co Ltd & Anor* [2013] 2 AMR 375; [2013] 3 MLJ 409;
- *AJWA For Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd and another appeal* [2013] 2 CLJ 395;
- *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2010] 2 AMR 151; [2010] 5 CLJ 83;
- *Rmarine Engineering (M) Sdn Bhd v Bank Islam Malaysia Bhd* [2012] 7 CLJ 540; and
- *Chain Cycle Sdn Bhd v Kerajaan Malaysia* [2016] 1 MLJ 681.

[20] [2011] 6 AMR 573; [2011] 6 MLJ 441, FC.

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