KNOWLEDGE & INSIGHTS

Recent Development Relating to the Law of Arbitration in Malaysia – A Recap of 2023

January 2024

INTRODUCTION

The law of arbitration in Malaysia continues to evolve as recent decisions of the national courts have sought to provide clarity with respect to some key areas relating to the enforcement of arbitral awards, setting aside arbitral awards, and the granting of a stay of proceedings pending reference to arbitration.

This article explores four (4) recent decisions handed down in the year 2023, which are noteworthy; namely:

(a) *Elizabeth Regina Maria Gabrielle von Pezold and Others v Republic of Zimbabwe*[1], which is a decision of the High Court on the registration and enforcement of the ICISD Award;

(b) *Tune Group Sdn Bhd & Ors v Padda Gurtaj Singh and another appeal*[2], which is a decision of the Court of Appeal addressing issues on the setting aside of an arbitral award;

(c) *Macsteel International Far East Ltd v Lysaght Corrugated Pipe Sdn Bhd and other appeals*[3], which is a decision of the Court of Appeal on the grant of a stay of court proceedings in favour of arbitration; and

(d) *Abd Rahman bin Soltan & Ors v Federal Land Development Authority & Anor and other appeals*[4], which is a decision of the Court of Appeal in which the arbitration proceedings have stayed in favour of court proceedings.

In addition, this article will briefly examine the performance of the Asian International Arbitration Centre ("**AIAC**") in the year 2023.

[1] [2023] MLJU 2657.
[2] [2023] 6 MLJ 345.
[3] [2023] 4 MLJ 551.
[4] [2023] 4 MLJ 318.

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THE VON PEZOLD CASE – ENFORCEMENT OF AN ICSID AWARD[5]

In the ***Von Penzold Case***, the International Centre for Settlement of Investment Disputes ("**ICSID**") received a Request for Arbitration from Elizabeth Regina Maria Gabrielle von Pezold and others ("**Claimants**") due to an alleged breach of various Bilateral Investment Treaties ("**BITs**") by Zimbabwe ("**Respondent**").

Via an amendment to Zimbabwe's constitution in 2005 following President Robert Mugabe's election, the Government of Zimbabwe was vested with the constitutional power to acquire lands with full title, for which no compensation would be given (the "**Land Reforms**"). This amendment also barred any parties from applying to court to challenge the acquisition of land by the Republic of Zimbabwe. Soon after the amendment to the Constitution was made, the Respondent acquired most of the Claimants' land and other property without paying any compensation.

The Claimants sought restitution against the Respondent to reinstate their title to their previously owned lands, as well as declaratory relief and compensation for losses. Having heard submissions from the parties, in an Award dated 28.07.2015 (the "**Award**"), the Tribunal found that there was direct expropriation by the Respondent and awarded damages to the Claimants. On 21.11.2018, an Application for Annulment filed by the Republic of Zimbabwe was dismissed by the Tribunal ("**Decision on Annulment**").

The suit initiated by the Claimants (the "**Plaintiffs**") in the High Court of Malaya at Kuala Lumpur was to recognise the Award and Decision on Annulment rendered against the Republic of Zimbabwe ("**Defendant**").

On 17.02.2023, Atan Mustaffa Yussof Ahmad J allowed recognition of the Award and Decision on Annulment in the ***Von Pezold*** case, being the first time, a Malaysian court has recognised an ICSID Award. The High Court held, *inter alia*, as follows:

(a) as long as the requirement of Article 54(2) of the ICSID Convention is satisfied, namely exhibiting copies of the Award and Decision on Annulment certified by the Secretary-General of the ICSID Centre, the High Court is mandated to recognise the Award according to the provisions of the ICSID Act;[6]

(b) sovereign immunity cannot be used to prevent recognition of an ICSID Award. Articles 54 and 55 of the ICSID Convention make clear that the consideration of sovereign immunity is limited to the execution stage. The High Court also found that the Defendant had submitted to the jurisdiction of the courts of every Contracting State to the ICSID Convention where the Award is being recognised, thereby waiving its immunity;[7]

[5] See also our earlier article entitled "Enforcement of ICSID Awards in Malaysia: Elizabeth Regina Maria Gabrielle von Pezold and Others v Republic of Zimbabwe".
[6] n(1), at [5]-[11].
[7] *Ibid,* at [12]-[25].

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(c) the absence of a procedural framework for the enforcement of ICSID awards in Malaysia does not preclude the High Court from exercising the substantive powers conferred to it by the ICSID Act. The High Court is permitted to adapt its procedures as necessary based on the principle that procedure with its rules is the handmaid, not the mistress, of justice. To refuse recognition would undermine the substantive authority of the Court under the ICSID Act and Malaysia's treaty obligations as a Contracting State to the ICSID Convention;[8]

(d) the fact that Malaysia does not have specific legislation for service of process on a foreign sovereign does not undermine the authority of the High Court to grant such orders for service out. Order 11, Rule 1(1)(M) of the Rules of Court 2012 ("**ROC 2012**") and Section 23 of the Civil Jurisdiction Act ("**CJA**") are separate and independent sources that permit service out of the jurisdiction;[9]

(e) enforcement of the Award and Decision on annulment was not restricted to Germany, Switzerland and/or Zimbabwe. This was apparent in the proper construction of the provisions of the relevant BITs. Further, in the absence of any reservation made to restrict the terms of the ICSID Convention, the ICSID Convention applies to all territories for which a Contracting State is responsible. In any event, the Most Favoured Nation ("**MFN**") Clauses in the relevant BITs did not support an interpretation that enforcement was restricted only to Germany, Switzerland and/or Zimbabwe;[10] and

(f) identification of assets is not required at the recognition stage. Given Malaysia's treaty obligations as a Contracting State to the ICSID Convention, the High Court may assume jurisdiction even if there is no evidence of assets for execution.[11]

The Republic of Zimbabwe has filed an appeal in the ***Von Penzold Case***. No decision of the Court of Appeal has been handed down yet.

This decision of the High Court in the ***Von Penzold Case*** is significant as it marks the first time that a court in Malaysia has recognised an ICSID award against a foreign sovereign nation. The High Court's robust approach to recognising the Award rendered against the Republic of Zimbabwe is to be applauded insofar as it evinces Malaysia's commitment to its treaty obligations under the ICSID Convention, as well as Malaysia's efforts more generally in posturing as an arbitration-friendly jurisdiction in line with the pro-arbitration and pro-enforcement policy underlying the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, to which Malaysia is also a signatory. At present, the decision of the High Court appears to provide certainty to investors that ICSID Awards will be recognised in Malaysia.

THE TUNE GROUP CASE – SETTING ASIDE OF ARBITRAL AWARDS

[8] *Ibid*, at [26]-[37].
[9] *Ibid*, at [61]-[65].
[10] *Ibid*, at [38]-[50].
[11] *Ibid*, at [51]-[53].

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In the ***Tune Group Case***, the Court of Appeal discussed the applicable parameters on an attempt by the Tune Group Sdn Bhd ("**TG**") to set aside an arbitral award handed down against it. The case revolved around TG's attempt to challenge an arbitral award by asserting that the arbitrator exceeded his jurisdiction and breached the rules of natural justice.

The facts before the High Court were as follows:

(a) by a shareholder agreement dated 23rd December 2008, TG (and Ors) on the one part and Padda Gurtaj Singh ("**PG**") on the other part were the shareholders of a company known as Tune Talk Sdn Bhd. A dispute arose between the parties concerning the sale of shares by TG to PG and the matter was referred to arbitration. PG sought for specific performance, but TG argued that there was no concluded contract. At the end of the hearing, the arbitrator ruled in favour of PG;

(b) the High Court was then called upon to deal with two applications filed by both parties simultaneously. TG filed an action before the High Court to set aside the arbitral award while the PG filed an application to register and recognise the said arbitral award;

(c) TG's main argument was that the arbitrator dealt with a dispute that was not within the terms of submission to the arbitration. In this case, the arbitrator concluded that there was a valid contract based on PG's solicitor's letter dated 20th December 2019;

(d) TG argued that the arbitral award contradicted PG's initial pleading that the contract was signed on 13th March 2020. TG claimed the arbitrator issued an award beyond the submission of the parties and/or violated the rules of natural justice as the arbitrator had exceeded his jurisdiction in deciding on matters that were not part of the pleaded claim. TG contended that the arbitral award should be set aside under Section 37(1)(a)(iv) and (v) and (b) read with Section 37(2) of the Arbitration Act 2005 ("**AA 2005**");

(e) in contrast, PG argued that the arbitrator acted within his jurisdiction. PG asserted that the arbitral award was decided based on the notice of arbitration, the pleadings, and the contemporaneous documentary evidence. PG further contended that the arbitral award is final and binding according to Clause 16.4 of the Agreement and Section 36 of AA 2005. Hence, the award must be enforced per Section 38 of AA 2005.

The High Court rejected TG's claim to set aside the arbitral award premised on, inter alia, the following reasons[12]:

(a) the High Court decided that the issue of PG's acceptance of the contract was an integral part of the submission during the arbitration. Hence, TG's claim had no merit since the arbitrator did not decide on a matter he created or added to the arbitration.

(b) TG's complaint that the arbitrator's failure to address their broad issues was an attempt to reopen the issues adjudicated in the arbitration. Moreover, an error of law or fact is not a ground for

[12] n(2), at [14].

setting aside the arbitral award. The High Court held that the claim has nothing to do with the arbitration process or the arbitral tribunal's jurisdiction.

TG advanced the very same arguments on appeal to the Court of Appeal, in asserting that the arbitrator acted beyond its jurisdiction in deciding a "*new difference*" which was not contemplated by or falling within the terms of the submission to the arbitration. The Court of Appeal disagreed with the arguments that were sought to be advanced by TG in highlighting that the parties pleaded that the contract was executed on 20th December 2019[13].

The Court of Appeal held that even if the parties did not plead that the contract was executed on 20th December 2019, the arbitrator was not bound by the exact pleas of the parties and may adopt a middle path based on the evidence before the arbitral tribunal makes a finding of fact. On this issue, Lim Chong Fong JCA in delivering the judgment of the Court of Appeal held in paragraphs 36 and 38 of the reported judgment that:

> "**[36]** ***On the specific facts and circumstances here, we do not therefore find that the arbitrator embarked and decided on a new difference; thereby acted in excess of jurisdiction, contrary to that as alleged by TG & Others. We are nonetheless mindful that TG & Others contended PGS had also taken a position in the objective records that the concluded contract was on 13 March 2020 that is anchored on PGS's unilateral suspension of the prescribed period set out in cl 9.2 (a) of the agreement pending the determination of the fair market value of the shares. However, this must in our view be understood contextually that it was an alternative plea by PGS in the event the arbitrator found that the contract was not concluded on 20 December 2019 because of non-payment for the shares. The arbitrator had clearly found that payment of the shares need not be concurrent with the acceptance of the share sale offer.***
>
> *[37] ...*
>
> ***[38] Moreover and in any event, we find and hold that the arbitrator need not have to slavishly decide based on the exact pleas of the parties so long they are within the cause of action pursued. We find that the cause of action here has all the time been maintained by PGS as breach of the concluded contract for non-transfer of the shares by TG & Others to PGS.*** *We are fortified by the Singapore Court of Appeal case of Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd [2007] 3 SLR 86 where VK Rajah JA held as follows with emphasis added by us:*
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> > *It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions.* ***The arbitrators, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without appraising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him. Similarly, an arbitrator is entitled — indeed, it is his obligation, to come to his own conclusions or inferences from the primary facts placed before him. In this context, he is not expected to inexorably accept the conclusions being urged upon him by parties, neither is he expected to consult the parties on his thinking***

[13] *Ibid*, at [33], [34] and [36].

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> ***process before finalising the award unless it involves a dramatic departure from what has been presented to him.***
>
> *Each case should be decided within its own factual matrix. It must always be borne in mind that it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied.*"

In so doing, the Court of Appeal endorsed the dicta of the Singapore Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd*[14] as being applicable in Malaysia.

Ultimately, the Court of Appeal went on to find that TG's arguments were an attempt to question the substantive merits of the arbitrator's findings, which is not permissible under Section 36 and/or Section 37 of the AA 2005. The Court of Appeal was of the view that the AA 2005 does not allow the parties to appeal the finding of fact made in an arbitral award[15]. As such, TG's appeal against the decision of the High Court to set aside the arbitral award was dismissed whilst the decision of the High Court to allow PG's application to register and enforce the said arbitral award was upheld[16].

THE MACSTEEL INTERNATIONAL CASE – STAY OF ARBITRATION PROCEEDINGS IN FAVOUR OF COURT PROCEEDINGS & THE GRANT OF AN ANTI-ARBITRATION INJUNCTION

In the ***Macsteel International Case***, the Court of Appeal discussed the issues surrounding the stay of court proceedings under Section 10 of the AA 2005 in favour of pending arbitration proceedings in Hong Kong under the Hong Kong International Arbitration Centre Rules and the grant of an anti-arbitration injunction in favour of court proceedings before the High Court of Malaya.

The dispute between the parties emanated from an alleged overdue unpaid payment for hot rolled coils supplied by Macsteel International Far East Ltd ("**MIFE**") to Lysaght Corrugated Pipes Sdn Bhd ("**LCP**") as well as Lysaght Galvanized Steel Bhd ("**LGS**") under several supply contracts between the parties. Through various supply contracts made in 2019 and 2020 between LCP as well as LGS and Popeye Resources Sdn Bhd ("**PR**"), both LCP and LGS purchased from PR imported hot rolled coils produced by MIFE. In total, LCP from March 2019 to February 2020 entered eleven (11) duly executed written supply contracts and LGS from January 2019 to February 2020 entered nine duly executed written supply contracts with PR respectively. The hot rolled coils were received by LCP and LGS and both made payments amounting to RM14,718,510 and RM10,522,675 to PR respectively. However, both LCP and LGS in September 2020 received an email from MIFE for overdue unpaid payment for hot rolled coils supplied in respect of several supply contracts amounting to USD1,151,630.84 and USD1,555,656.12 respectively. According to MIFE, there were allegedly five duly executed written supply contracts entered into between October 2019 and February 2020 between LCP and MIFE and three duly executed written supply contracts entered into

[14] [2007] 3 SLR 86.
[15] *Ibid*, at [40].
[16] *Ibid*, at [46]-[47].

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from January 2020 to February 2020 between LGS and MIFE. These supply contracts contained an arbitration clause for disputes to be resolved under the auspices of the Hong Kong International Arbitration Centre. Both LCP and LGS impugned these alleged supply contracts and claimed the documents produced by MIFE were forged because they only dealt with PR concerning the purchase of the imported hot rolled coils. Police reports were lodged by LCP and LGS.

MIFE however contended that there were previously also fourteen (14) similar supply contracts made between LCP/LGS and MIFE which were completed, and all paid promptly without any incident. In those supply contracts, PR acted as the intermediary agent of LCP and LGS including arranging for the supply contracts to be executed by LCP and LGS respectively. For all these supply contracts, PR received payment from LCP and LGS in Ringgit Malaysia and remitted the payment to MIFE in US Dollars. As a result, MIFE on 15 December 2020 commenced arbitration proceedings against both LCP and LGS in Hong Kong to recover the alleged unpaid payments. LCP and LGS in consequence on 14 March 2021 initiated legal proceedings before the Kuala Lumpur High Court against both PR and MIFE In the suit, LCP and LGS sought a declaration that the supply contracts were forged and null and void as well as a permanent injunction prohibiting the commencement of the arbitration proceedings in Hong Kong.

MIFE sought a stay of the proceedings before the Kuala Lumpur High Court under Section 10 of the AA 2005 in favour of the arbitration proceedings in Hong Kong, whilst LCP and LGS sought an anti-arbitration injunction. In refusing the stay application, the High Court that whilst one should be slow to interfere with the jurisdiction of the arbitral tribunal, it did not mean that the High Court should readily grant a stay application under Section 10 of the AA 2005 when the existence of the arbitration agreement itself was in question without evaluating the facts and evidence based on the full merits approach. The High Court therefore opted for the second option (i.e., to give directions for the trial by the court of the issue) in the guidelines provided by the court in the English case of *Nigel Peter Albon v Naza Motor Trading Sdn Bhd*[17] ("***Peter Albon***"). On appeal, MIFE urged the Court of Appeal to adopt the approach taken in the Singapore case of *Malini Ventura v Knight Capital Pte Ltd and others*[18] ("***Malini Venture***") and to embark on the third option in the guidelines prescribed in ***Peter Albon*** (i.e., to stay the proceedings on the basis that the arbitrator would decide the issue).

It is pertinent to pause here and have regard to the guidelines in ***Peter Albon*** in dealing with an application for stay pending reference to arbitration where the contract and/or agreement to arbitrate is in issue or alleged to have been forged and/or procured by fraud may be summarised as follows[19]:

(a) (where it is possible to do so) to decide the issue on the available evidence presently before the court that the arbitration agreement was made and grant the stay;

(b) to give directions for the trial by the court of the issue;

(c) to stay the proceedings on the basis that the arbitrator will decide the issue; and

[17] [2007] 2 All ER 1075.
[18] [2015] 5 SLR 707.
[19] [2023] 4 MLJ 551 at paragraph 18.

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(d) (where it is possible to do so) to decide the issue on the available evidence that the arbitration agreement was not made and dismiss the application for the stay.

Lim Chong Fong JCA on behalf of the Court of Appeal held that[20]:

(a) it was first necessary to review the interplay between Section 10(1) and (4) of the AA 2005 with Section 18(1) and (2) of the AA 2005 in the light of the rival arguments advanced by the parties as to whether the second or third option in the guidelines prescribed in ***Peter Albon*** to determine if there was concluded arbitration agreement that was not null and void, inoperative or incapable of being performed;

(b) it was pivotal to ascertain if the said supply contracts were obtained by forgery, probably by PR more so given that the PR had not entered an appearance in the proceedings before the Kuala Lumpur High Court;

(c) having regard to the dicta in ***Peter Albon*** that the arbitration agreement would be null and void, and hence invalid if the supply contracts had been procured by fraud. Such a determination could not be made on affidavit but would require investigation which would be best done before the Kuala Lumpur High Court because of the fact that the impugned supply contracts emanated from Malaysia probably through the participation of PR which is based in Malaysia. If the investigation were to be undertaken by the Kuala Lumpur High Court, there is the availability of power to compel PR's attendance via subpoena which is unavailable to the Hong Kong-based arbitration. As such, the decision in ***Malini Ventura*** is distinguishable on its special facts given that the transaction in that case was performed entirely in Singapore;

(d) as such, the Kuala Lumpur High Court did not commit a serious error in exercising its discretion in refusing the stay application;

(e) consequentially, it would also be necessary to preserve the status quo pending the investigation that is to be undertaken by the Kuala Lumpur High Court. Thus, the anti-arbitration injunction sought was correctly granted. In this regard, no injustice would be caused to MIFE by being restrained from proceeding with the arbitration pending the undertaking of the investigation by the Kuala Lumpur High Court. The delay in re-commencing the arbitration could in any event be compensable in costs as well as by way of interest; and

(f) as such, the appeal lodged by MIFE was dismissed and the matter remitted to the Kuala Lumpur High Court for determination albeit before a different judge.

THE FELDA CASE – ANTI-ARBITRATION INJUNCTIONS

In *Abd Rahman bin Soltan & Ors v Federal Land Development Authority & Anor and other appeals* ("***Felda case***"), the three (3) appeals involved the disputes between En Rahman, Pn Noraini, Synergy Promenade Sdn Bhd ("**SP**") and Synergy Promenade KLVC Sdn Bhd ("**SPKLVC")** (collectively "**SP Group**") against

[20] [2023] 4 MLJ 551 at paragraphs 30 to 39.

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Federal Land Development Authority ("**FELDA")** and FELDA Investment Corp Sdn Bhd ("**FIC**"). FIC had appointed SP as the master developer for a proposed commercial development project ("**project**") on FELDA's lands and for such purpose, they entered into a development agreement ("**DA**"). Relevant to the dispute was Article 9.04 of the DA which provided that in the event of a breach by either party, it was agreed to either resolve the same by way of application for specific performance in court or by way of arbitration. FELDA was not a party to this DA. There was also a power of attorney ("**PA**") attached to the DA which was purportedly granted by FELDA to SP to deal with FELDA's land. By utilising the PA, both SP and SPKLVC had concluded two sale and purchase agreements ("**SPAs**") for two plots of FELDA's land but after FELDA, SP and SPKLVC entered into a memorandum of understanding ("**MOU**") in which FELDA affirmed that SP was the master developer of the project, the two plots of lands that were transferred to SP and SPKLVC respectively were re-registered in the name of FELDA.

There are several disputes between the parties, but the appeals in the ***Felda case*** were only concerning three (3) cases, two of which were related to Suit 843. Suit 843 was filed by FELDA and FIC against SP Group and three other parties including twelve (12) individuals who had previously held positions in FELDA and FIC claiming, inter alia, (i) that the DA was executed without the approval of the relevant minister which in effect invalidated the PA, the SPAs and the MOU, (ii) that the SP Group and the other parties had committed the tort of conspiracy to defraud or injure FELDA or FIC by causing the execution of the DA, PA and the SPAs, (iii) to conceal the initial tort of conspiracy, the said parties had committed the second tort of conspiracy by causing FELDA to enter into the MOU, and (iv) the twelve (12) individuals had breached their fiduciary duties owed by them to FELDA and FIC. In addition to Suit 843, there were also other legal proceedings such as the action by SP for specific performance in Suit 477 pursuant to Article 6.04 of the DA claiming delivery of vacant possession of FELDA's land, and Suit 795 which was related to ownership of the two plots of FELDA's land.

In the present ***Felda case***, there were three appeals filed by the parties. Appeal 511 was filed against the High Court's decision to dismiss SP Group's application for a stay of Suit 843 pending the disposal of the arbitration action commenced by SP against FIC. Appeal 519 concerning the decision of the High Court in allowing the application by FELDA and FIC for an interim injunction in Suit 843 to restrain SP, SP's directors, agents, servants, and nominees from continuing with the arbitration action. Lastly, Appeal 1265 was concerning the High Court's decision in dismissing the originating summons ("**OS**") filed by FIC against SP for the following remedies: (i) a declaration that article 9.04 of the DA was null and void, inoperative and/or incapable of being performed, (ii) a declaration that the arbitration was null and/or void, (iii) a declaration that SP had waived its right to refer any dispute or difference under the DA to arbitration, (iv) a declaration that the arbitration was an abuse of process, and (iv) a permanent injunction to restrain SP, SP's directors, agents, servants, and nominees from continuing with the arbitration action.

Wong Kian Kheong JCA in delivering the decision of the Court of Appeal dismissed Appeal 511 and Appeal 519, whilst allowing Appeal 1265 in part. In summary, the Court of Appeal held that:

(a) FELDA was not bound by Article 9.04 of the DA as (i) all the eight clauses in the MOU did not refer to Article 9.04 of the DA; and (ii) there was nothing in the MOU, either expressly or impliedly, which had provided for Article 9.04 of the DA to be part of the MOU within the meaning of Section 9(5) of the AA 2005;

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(b) due cognisance ought to be given to the fact that SP had not made FELDA a co-respondent in the arbitration proceedings. As such premised on the decision in *Protasco Bhd v Tey Por Yee and another appeal*[21] ("***Protasco case***") and *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors*[22] ("***Jaya Sudhir case***") the SP Group could not rely on Sections 8, 9, 10, and 18 of the AA 2005 to support the grant of a stay pending reference to arbitration against the non-parties including FELDA;[23]

(c) given that the DA was a commercial agreement, Article 9.04 of the DA ought to be construed by the court of law in a manner which made business common sense whereby: (1) if any party to the DA had first exercised the right to litigate, neither SP nor FIC could thereafter invoke the right to arbitrate; or (ii) if any party to the DA had first exercised the right to arbitrate, both SP and FIC could not then resort to the right to litigate[24];

(d) the evidence supported SP's waiver of its right to arbitrate considering that (i) the amended defence had pleaded the issue of illegality and the first tort of conspiracy, SP should have applied to stay Suit 477; (ii) SP abandoned the right to arbitrate under article 9.04 of the DA when SP took a step in the proceedings and applied for summary judgment against FELDA and FIC in Suit 477; and (iii) SP confirmed the abandonment of its right to arbitrate according to Article 9.04 of the DA when SP filed an appeal against the High Court's dismissal of the summary judgment application[25];

(e) considering SP's waiver of its right to arbitrate, SP should not have commenced and continued with the arbitration. Furthermore, there was a multiplicity of proceedings as SP filed (i) an appeal against the dismissal of the summary judgment, (ii) an appeal against the striking out of Suit 477, and yet instituted the arbitration proceedings which may lead to a conflict of decisions. Added to the above, a significant amount of time, legal expenses and effort may be unnecessarily expended by SP, FELDA and FIC in the prosecution of the dispute before the national courts and the arbitral tribunal. As such, the institution of the arbitration proceedings constituted an abuse of the arbitral process which had caused detriment to FELDA and FIC[26];

(f) premised on the ***Protasco case*** and *LNH Landscaping Sdn Bhd v TKH Construction Sdn Bhd and other appeals*[27], notwithstanding the institution of the arbitration proceedings, pursuant to Order 92 Rule 4 of the Rules of Court 2012 and the court's inherent jurisdiction and/or inherent power it was proper to proceed with Suit 843 instead seeking to stay Suit 843 pending the outcome of the arbitration proceedings. In the interest of transparency to ensure that the objects of the Land Development Act 1956 which was enacted to assist FELDA settlers are not circumvented, there is a public interest element or consideration which warrants the dispute to be determined expeditiously in open court and not confidentially by way of arbitration[28];

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[21] [2018] MLJU 993.
[22] [2019] 5 MLJ 1.
[23] [2023] 4 MLJ 318 at paragraphs 42 to 45.
[24] *Ibid* at paragraphs 47 to 52.
[25] *Ibid* at paragraphs 59.
[26] *Ibid* at paragraph 61.
[27] [2021] MLJU 761.
[28] *Ibid* at paragraph 67.

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(g) with respect to Appeal 519, Wong Chee Lin J sitting in the High Court was correct in the exercise of discretion having applied the right test and had taken into account all the relevant considerations in granting an interim injunction under Sections 50 and 51(1) of the Specific Relief Act 1950 read with Order 29 Rule 1(1) of the Rules of Court 2012 to restrain, among others, SP, from proceeding with the arbitration proceedings. In addition, the High Court was correct in its approach, in that (i) premised on the business common sense interpretation and the contra proferentem rule of construction, SP had no right to arbitrate pursuant to Article 9.04 of the DA; (ii) SP had waived its right to arbitrate; (iii) the arbitration proceedings constituted an abuse of process; and (iv) the decision was consistent with the need to transparency and for an expeditious trial[29]; and

(h) concerning Appeal 1265, having regard to Sections 41 and 52(1) of the Specific Relief Act 1950 read with Order 15 Rule 16 of the Rules of Court 2012, the decision of the High Court handed down by Anand Ponnudurai J was reversed in part such that no order be made in respect of Prayer 1 and Prayer 2 of Suit 5 because these prayers concerned issues which were still pending in Suit 843 and could only be decided by the High Court in Suit 843 after a trial. Prayer 3 and Prayer 4 were allowed, given that SP had waived its right to arbitrate, and the arbitration proceedings are an abuse of process. Concerning Prayer 5, it ought to be noted that Sections 50, 51(2) and 52(1) of the Specific Relief Act 1950 referred to the term 'perpetual' injunction(s). As such, the High Court ought to have granted a perpetual injunction to restrain SP from proceeding with the arbitration in question[30].

AIAC – AN OVERVIEW OF THE YEAR 2023

The year 2023 was an active one for the AIAC. There have been a series of amendments to its rules, by reference to newly introduced the AIAC Arbitration Rules 2023, AIAC Mediation Rules 2023 and the AIAC i-Arbitration Rules 2023, as well as the introduction of the Asian Sports Arbitration Rules.

The AIAC appears to have directed its focus on being globally visible in 2023 with significant programmes and events being held in numerous jurisdictions within the Asia Pacific Region as well as in Africa and Europe, and not just in Malaysia.

The year 2023 saw a total of 873 disputes being registered or pre-registered. Over 78.24% of the cases (i.e. 683 cases) were adjudication disputes, whilst 20.39% of the cases (i.e. 178 cases) were either AIAC-administered arbitrations or ad-hoc arbitrations[31]. For 2023, the total value of disputes in respect of AIAC administered arbitrations stood at approximately USD751 million, which represented an increase from 2022. In contrast, the total value of disputes referred to adjudication under the Construction Industry Payment & Adjudication Act 2012 ("**CIPAA 2012**") fell to RM1.3 billion from RM1.7 billion in 2022[32]. Of the 178 new arbitration cases, 158 were AIAC-administered arbitration disputes whilst 25 were ad-hoc arbitration where the Director of the AIAC appointed the arbitrator under the provisions of the AA 2005[33]. It should

[29] *Ibid* at paragraphs 71 to 73.
[30] *Ibid* at paragraphs 74 to 79.
[31] AIAC Annual Report 2023 at pg. 13.
[32] AIAC Annual Report 2023 at pg. 14.
[33] AIAC Annual Report 2023 at pg. 24.

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however be noted that the number of arbitrations that were recorded as being international stood at 11[34]. The areas of dispute that were the subject of arbitration were predominantly construction related which accounted for 57.28% of all arbitration cases, followed by shareholder disputes at 13.59% and service agreement disputes at 12.62%[35].

COMMENTARY

The ***Von Pezold case*** is significant in that it demonstrates the robust approach the national courts in Malaysia are willing to adopt in recognising an ICSID Award against a sovereign state. It evinces Malaysia's commitment to its treaty obligations under the ICSID Convention, as well as Malaysia's efforts more generally in posturing as an arbitration-friendly jurisdiction in line with the pro-arbitration and pro-enforcement policy underlying the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, to which Malaysia is also a signatory. At present, the decision of the High Court appears to provide certainty to investors that ICSID Awards will be recognised in Malaysia. Whilst the High Court in the ***Von Pezold Case*** has held that considerations of sovereign immunity are not relevant and therefore premature at the recognition stage, it remains to be tested whether the Malaysian courts will allow a State against whom an ICSID award has been rendered to raise the defence of sovereign immunity for the purposes of enforcement and/or execution proceedings.

The ***Tune Group case*** reaffirms the judicial approach of minimalistic court intervention vis-à-vis applications to set aside arbitral awards. The national courts in Malaysia generally adopt a restrictive approach in dealing with challenges to an arbitral award in seeking to give appropriate deference to the notion of party autonomy and upholding the agreement of the parties in having elected to have their dispute arbitrated.

The Court of Appeal's decision in the ***Macsteel International case*** by applying the principles in ***Peter Albon*** is significant in that it demonstrates that the national courts in Malaysia will where necessary, embark on a comprehensive assessment of the existence and validity of an arbitration agreement where necessary before acceding to a request for a stay of court proceedings pending reference to arbitration.

The ***Felda case*** is significant in that whilst clarity was provided that non-parties to an arbitration agreement are not entitled to seek a stay of court proceedings in favour of arbitration proceedings under the AA 2005, the decision is interesting in that the Court of Appeal appears to (i) have adopted a "public interest element" approach by reference for the need for there to be transparency in determining that the dispute between the parties ought to be litigated rather arbitrated to ensure that the objects of the Land Development Act 1956 which was enacted to assist FELDA settlers, is given effect to, and (ii) been unequivocal in holding that the institution of the arbitration proceedings in the said case was an abuse of process.

Ultimately, these four (4) significant decisions are indicative of the fact that whilst the general approach of the courts is pro-arbitration, the Malaysian judiciary will not be afraid where necessary on a proper and detailed examination of the record to step in grant appropriate relief, including but not limited to

[34] AIAC Annual Report 2023 at pg. 24.
[35] AIAC Annual Report 2023 at pg. 25.

+603-2726 3700 +6032726 3733 cecilabraham.com

registration of an ICSID Award by exercising its inherent powers or the grant of an anti-arbitration injunction, should circumstances dictate such relief be granted.

In terms of the arbitration landscape the year 2023 was a busy one. Added to the significant jurisprudence emanating from the courts, the AIAC was active in increasing its presence in the region and in revising its arbitration rules to endeavour to increase its caseload. It is envisaged that there will be further restructuring of the management and operations at the AIAC in the year 2024[36]. It remains to be seen how efficient and effective the proposed restructuring sought to be introduced by the Minister of Law and Institutional Reform will be. What however is clear is that a significant amount of work and funding will be required if the AIAC is to endeavour to bridge the gap in terms of caseload (particularly in terms of significant international arbitration disputes) and being the preferred regional institution of choice vis-à-vis the other two regional arbitration institutes of note that are based in Singapore and Hong Kong.

CONTACTS

Tan Sri Dato' Cecil W. M. Abraham

SENIOR PARTNER
cecil@cecilabraham.com

Dato' Sunil Abraham

PARTNER
sunil@cecilabraham.com

Aniz Ahmad Amirudin

PARTNER
aniz@cecilabraham.com

[36] AIAC Annual Report at pg. 11 to 14.