An Overview of Arbitration in Malaysia

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1. EXECUTIVE SUMMARY

1.1 What are the advantages and disadvantages relevant to arbitrating or bringing arbitration-related proceedings in your jurisdiction?

- Malaysia is a signatory to the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). As such, an arbitral award from Malaysia is enforceable in more than 148 countries.


- Malaysia is a common law jurisdiction, and the Malaysian courts regard decisions by Commonwealth courts as highly persuasive, particularly in commercial matters.

- Sections 11 and 19 of the AA give the courts and arbitral tribunals, respectively, the power to order interim measures. Pursuant to section 19 of the AA, arbitral tribunals have the power to order security for costs, discovery of documents and interrogatories, giving of evidence by affidavit, and the preservation, interim custody or sale of any property which is the subject matter of the dispute.

- Arbitral immunity: section 47 of the AA expressly 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 his or her functions as an arbitrator unless the act or omission is shown to have been in bad faith.

- Unless otherwise agreed by the parties, no person shall be precluded by reason of nationality from acting as an arbitrator: section 13 of the AA.

- In applying to set aside an arbitral award, the members of the arbitral tribunal are not named as a party to the application.

- Foreign lawyers are allowed to appear in arbitral proceedings both as counsel and as arbitrator.

- According to the website of the Kuala Lumpur Regional Centre for Arbitration, there is no withholding tax imposed on arbitrators (see http://klrca.org/about/).

- Cost effectiveness: arbitrations are cheaper to hold in Malaysia than in neighbouring countries.

- According to the website of the Kuala Lumpur Regional Centre for Arbitration, foreign arbitrators do not need a work permit or a professional visit pass when conducting an arbitration in Malaysia for a short duration (see http://klrca.org/about/).

- There is minimal judicial intervention with respect to arbitral proceedings. Section 8 of the AA expressly states that “No court shall intervene in matters governed by this Act, except where so provided in this Act”. Pursuant to section 10 of the AA, a court must stay proceedings that are the subject matter of an arbitration unless the parties have already taken steps in the court proceedings, or the arbitration agreement is null and void, inoperative or incapable of being performed.

- An award shall be final and binding on the parties, and it may be relied upon by any party by way of defence, set-off or otherwise in any proceedings in any court (section 36 (1), AA).
● An arbitral award can only be set aside in exceptional circumstances. This is discussed in Section 5.1 below.

● The Malaysian courts have repeatedly held that an arbitral award is conclusive and can only be challenged in exceptional circumstances. In particular, international awards (which include any award where one party is not Malaysian) can only be challenged on the grounds set out in the New York Convention. An award will not be set aside merely because of the failure of an arbitrator to draw correct inferences of fact.

● The Kuala Lumpur Regional Centre for Arbitration (KLRCA) is the primary venue for international arbitration proceedings held in Malaysia. The KLRCA has excellent modern facilities, including (http://klrca.org):
  • 3 large hearing rooms (up to 22 persons);
  • 10 medium hearing rooms (up to 14 persons);
  • 5 small hearing rooms (up to 10 persons);
  • 15 breakout rooms;
  • seminar room;
  • auditorium (up to 182 persons);
  • business centre;
  • arbitrator’s lounge;
  • specialised alternative dispute resolution & construction law library;
  • advanced video conferencing equipment;
  • ultramodern court recording & transcription system;
  • private dining room;
  • cafeteria;
  • outdoor cafeteria; and
  • library and resource centre.

Malaysia has become an arbitration-friendly jurisdiction and we would rate it as a 5.

2. GENERAL OVERVIEW AND NEW DEVELOPMENTS

2.1 How popular is arbitration as a method of settling disputes? What are the general trends and recent developments in your jurisdiction?

Arbitration has been increasingly used as a method of dispute resolution in Malaysia. Originally used in construction disputes, it is becoming increasingly popular for commercial dispute resolution. The enactment of the Model Law in the form of the 2005 Arbitration Act, which replaced the outdated 1952 Arbitration Act, has increased public confidence in, and adoption of, the arbitral process.

Consistent with the experience in other jurisdictions, we anticipate that the mandating of adjudication in construction disputes by the Construction Industry Payment and Adjudication Act 2012 will lead to a reduction in construction-related disputes being referred to arbitration.

2.2 Are there any unique jurisdictional attributes or particular aspects of the approach to arbitration in your jurisdiction that bear special mention?

Due to the colonial heritage and the large number of students who receive their tertiary education in England and Australia, English is the main language of both law and business in Malaysia, and most commercial arbitrations are conducted in English. However, Malaysia is a multiracial country and its arbitrators can converse in English, Malay, Tamil, Mandarin and/or Chinese dialects. Translators and interpreters are also widely available. Pursuant to section 24 of the AA, the parties are free to agree on the language to be used in the arbitral proceedings.
2.3 Principal laws and institutions

2.3.1 What are the principal sources of law and regulation relating to international and domestic arbitration in your jurisdiction?

The principal source of law and regulation relating to international and domestic arbitration is the AA. The AA is based on the Model Law. Malaysia is a signatory to the New York Convention, key provisions of which have been adopted in the AA.

Unless the parties to an international arbitration agree, Part III of the AA (further explained below) shall not apply to that arbitration. Conversely, unless the parties to a domestic arbitration otherwise agree, Part III shall apply to the domestic arbitration. The parties may agree to apply or exclude the application of Part III of the AA in whole or in part.

Part III of the AA comprises seven sections (sections 40–46) of the AA, which deal with:

- Consolidation of proceedings and concurrent hearings.
- Determination of preliminary points of law by the High Court in the course of the arbitration with the consent of the arbitral tribunal or every other party to the arbitration.
- Reference to the High Court of any question of law arising out of the arbitral award.
- Appeal against the decision of the High Court on the question of law arising out of the arbitral award.
- Costs and expenses of the arbitration.
- Extension of time for the commencement of arbitral proceedings.
- Extension of time for the making of an arbitral award.

Malaysia is a party to the ICSID Convention.

2.3.2 Which are the principal institutions that are commonly used and/or government agencies that assist in the administration or oversight of international and domestic arbitrations?

The principal institution that both administers and commonly provides a venue for commercial arbitrations in Malaysia is the KLRCA. The KLRCA maintains its own rules of arbitration, which are a modification of the UNCITRAL Rules of Arbitration. The KLRCA also maintains, amongst others, the following rules:

- i-Arbitration rules, for arbitration of disputes arising from commercial transactions premised on Islamic principles. The rules incorporate a reference procedure to a Shariah Advisory Council or Shariah expert whenever the arbitral tribunal has to form an opinion on a point related to Shariah principles.
- Fast track arbitration rules, designed for parties who wish to obtain an award in the fastest way with minimal costs.

The KLRCA was established in 1978 under the auspices of the Asian-African Legal Consultative Organization. The KLRCA was the first regional centre established in Asia to provide institutional support as a neutral and independent venue for the conduct of domestic and international arbitration proceedings in Asia. It was also the first centre in the world to adopt the UNCITRAL Arbitration Rules as revised in 2010. The KLRCA has developed new rules to cater for the growing demands of the global business community, such as the KLRCA i-Arbitration Rules and the KLRCA Fast Track Rules, as well as Mediation and Conciliation Rules. The KLRCA has won several awards, including the prestigious Global Arbitration Review Award for ‘innovation by an individual or organisation in 2012’. KLRCA has a panel of over 700 experienced domestic and international arbitrators.

Besides the KLRCA, arbitrations are also administered by a number of other bodies, including the Institute of Engineers Malaysia, Kuala Lumpur and Selangor Chinese Chambers of Commerce, Malaysian Rubber Board, Palm Oil Refiners Association of Malaysia, Institution of Surveyors, the Malaysian International Chambers of Commerce and the Malaysia Institute of Architects.
2.3.3 Which courts or other bodies have judicial oversight or supervision of the arbitral process?
The High Court has judicial oversight and supervision of the arbitral process in Malaysia. An arbitral award that is made in West Malaysia falls under the jurisdiction of the High Court of Malaya. An arbitral award that is made in East Malaysia falls under the jurisdiction of the High Court of Sabah & Sarawak. An appeal from either of the courts would be made to the Court of Appeal. The Federal Court, the highest court, has the jurisdiction to hear an appeal from the Court of Appeal, but only when leave has been granted. Leave to appeal to the Federal Court will only be granted if the decision of the Court of Appeal raises questions of general principle on which the Federal Court has not previously decided or questions of importance upon which further argument and a decision of the Federal Court would be to the public’s advantage.

3. ARBITRATION IN YOUR JURISDICTION — KEY FEATURES

3.1 The appointment of an arbitral tribunal
3.1.1 Are there any restrictions on the parties’ freedom to choose arbitrators?
The parties are free to choose the arbitrators. However, pursuant to section 14 of the AA, an arbitrator’s appointment may be challenged if there are circumstances likely to give rise to justifiable doubts as to that person’s impartiality or independence, or if that person does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by the same party, or in whose appointment that party has participated, only for reasons of which that party becomes aware after the appointment has been made.

Foreign lawyers are allowed to appear in arbitral proceedings both as counsel and arbitrators. Pursuant to section 13 of the AA, unless otherwise agreed by the parties, no person shall be precluded by reason of nationality from acting as an arbitrator. There is no requirement that an arbitrator must be a member of the local Bar.

3.1.2 Are there specific provisions of law regulating the appointment of arbitrators?
Pursuant to section 12(1) of the AA, the parties are free to determine the number of arbitrators. Pursuant to section 13 of the AA, the parties are free to agree on a procedure for appointing the arbitrator or the presiding arbitrator.

3.1.3 Are there alternative procedures for appointing an arbitral tribunal in the absence of agreement by the parties?
Either party may apply to the Director of the KLRCA for appointment of the party-appointed arbitrator(s), presiding arbitrator and/or sole arbitrator pursuant to section 13 of the AA. Should the Director of the KLRCA fail to act within 30 days from the application, any party may apply to the High Court for such appointment. Pursuant to section 12(2) of the AA, should the parties fail to determine the number of arbitrators, the arbitral tribunal shall consist of three arbitrators (in the case of an international arbitration) or a single arbitrator (in the case of a domestic arbitration).

3.1.4 Are there requirements (including disclosure) for “impartiality” and/or “independence”, and do such requirements differ as between domestic and international arbitrations?
Pursuant to section 14(1) of the AA, a person who is approached in connection with that person’s possible appointment as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to that person’s impartiality or independence. This duty to disclose shall continue until the final award is rendered. In this regard, section 14(2) of the AA places the duty on the arbitrator to disclose to the parties, without delay, from the time of appointment and throughout the arbitral proceedings, any circumstances that are likely to give rise to justifiable doubts as to his or her impartiality or independence, unless the parties have already been informed of such circumstances by the arbitrator.

These requirements do not differ between domestic and international arbitrations.
3.1.5 Are there provisions of law governing the challenge or removal of arbitrators?

Yes, sections 14–17 of the AA govern challenges to, and removal of, arbitrators. An arbitrator may be challenged only if the circumstances give rise to justifiable doubts as to his or her impartiality or independence, or he or she does not possess qualifications agreed to by the parties (section 14(3), AA).

Unless otherwise agreed by the parties, the party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or of any reasons referred to in section 14(3) of the AA, send a written statement of the reasons for the challenge to the arbitral tribunal (section 15(1), AA). The words “Unless otherwise agreed by the parties” in section 15(1) of the AA signify that the parties can agree to a procedure for the challenge of arbitrator. Most rules of arbitration maintained by the arbitral institution set out their respective challenge procedures.

The arbitral tribunal shall then make a decision on the challenge, unless the challenged arbitrator withdraws from office or the other party agrees to the challenge. If the challenge is not successful, the challenging party may, within 30 days after having received notice of the decision rejecting the challenge, apply to the High Court to make a decision on the challenge. The decision of the High Court shall be final and no appeal may be made.

If the challenge is successful, it appears that the other party does not have a right to appeal to the High Court against the decision.

Where an arbitrator withdraws from office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any of the following grounds:

- The circumstances give rise to justifiable doubts as to that arbitrator’s impartiality or independence.
- The arbitrator does not possess qualifications agreed to by the parties.
- The arbitrator is in law or in fact unable to perform the functions of that office, or for other reasons fails to act without undue delay.

A substitute arbitrator shall be appointed where the mandate of an arbitrator terminates, an arbitrator withdraws from office for any other reason, the mandate of the arbitrator is revoked by agreement of the parties or in any other case of termination of mandate. Where a single or the presiding arbitrator is replaced, any hearings previously held shall be repeated before the substitute arbitrator. Where an arbitrator other than a single or the presiding arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal.

For the avoidance of any doubt, any order or ruling made by the arbitral tribunal prior to the replacement of an arbitrator shall not be invalid solely on the ground that there has been a change in the composition of the arbitral tribunal.

3.1.6 What role do national courts have in any such challenges?

See Section 3.1.5 above.

3.1.7 What principles of law apply to determine the liability of arbitrators for acts related to their decision-making function?

Section 47 of the AA expressly 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 his functions as an arbitrator unless the act or omission is shown to have been in bad faith.
3.2 Confidentiality of arbitration proceedings

3.2.1 Is arbitration seated in your jurisdiction confidential? What are the relevant legal or institutional rules which apply?

Although there is no statutory provision contained in the AA which declares arbitration proceedings as confidential, it is not uncommon for parties to enter into an arbitration agreement on the basis that all matters relating to the arbitral proceedings shall be kept confidential.

In the absence of such a confidentiality clause in the arbitration agreement, the Malaysian courts would most likely imply an obligation of confidentiality in the arbitration agreement. Most confidentiality clauses are adopted in the arbitration agreement by adopting a set of arbitral institutional rules which contains such a clause. For example, Rule 15, Part 1 of the KLRCA 2013 arbitration rules expressly provides for confidentiality.

3.2.2 To what matters does any duty of confidentiality extend (for example, does it cover the existence of the arbitration, pleadings, documents produced, the hearing and/or the award)?

This will depend on any confidentiality agreement entered into by the parties, as there is no relevant statutory provision.

3.2.3 Can documents or evidence disclosed in arbitration be used in other proceedings or contexts?

Unless otherwise expressly agreed between the parties or if they are in the public domain, documents or evidence disclosed in arbitration cannot be used in other proceedings or contexts. As mentioned in Section 3.2.1 above, in the absence of a confidentiality agreement relating to the arbitration, the Malaysian courts would most likely imply an obligation of confidentiality in the arbitration agreement.

However, pursuant to section 36(1) of the AA, the award made by an arbitral tribunal may be relied upon by any party to the arbitral proceeding by way of defence, set-off or otherwise in any proceedings in any court.

3.2.4 When is confidentiality not available or lost?

Confidentiality is lost if the parties waive such confidentiality or the court makes an order granting permission to disregard it. Confidentiality is not available in respect of documents in the public domain.

Documents filed in the courts and read out in open court are public documents. Thus matters relating to an arbitral proceedings may lose their confidentiality if the award is challenged and the arbitration documents are produced in the High Court.

3.3 Role of (and interference by) the national courts and/or other authorities

3.3.1 Will national courts stay or dismiss court actions in favour of arbitration?

Section 8 of the AA expressly states that “No court shall intervene in matters governed by this Act, except where so provided in this Act”.

Pursuant to section 10 of the AA, it is mandatory for the Malaysian courts to stay any court proceedings which are the subject of an arbitration agreement in favour of arbitration. A stay will be refused if:

- The party applying for a stay of proceedings has taken definite, conscious and deliberate steps to participate in the court proceedings.
- The arbitration agreement is null and void, inoperative or incapable of being performed.

3.3.2 Are there any grounds on which the national courts will order a stay of arbitral proceedings?
The courts are unlikely to order a stay of the arbitral proceedings unless the arbitral tribunal has no jurisdiction. The procedure for challenging jurisdiction is discussed in Section 3.6.3 below.

3.3.3 What is the approach of national courts to parties who commence court proceedings in your jurisdiction or elsewhere in breach of an agreement to arbitrate?

The courts have consistently favoured arbitrations as the parties’ choice of dispute resolution. The power of the court to grant a stay of its proceedings in favour of arbitration is discussed in Section 3.3.1 above.

Besides granting a stay of the court proceedings, anti-suit injunctions restraining a party from commencing court proceedings in other jurisdictions in breach of an arbitration agreement which provides Malaysia as the seat of arbitration may be granted by the courts.

3.3.4 Is there a presumption of arbitrability or policy in support of arbitration? Have national courts shown a willingness to interfere with arbitration proceedings on any other basis?

Pursuant to section 4(1) of the AA, 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. The public policy of Malaysia may differ from that of another jurisdiction and must be considered in a Malaysian context. There is a presumption of arbitrability which is qualified by public policy requirements. In practice, the courts will presume arbitrability of commercial disputes (except gaming contracts).

As mentioned in Section 3.3.3 above, the courts have consistently favoured arbitrations. Pursuant to section 8 of the AA, the national courts cannot intervene in matters governed by the AA except where so provided in the AA.

As such, it is unlikely that the courts will interfere with arbitration proceedings on any basis other than lack of jurisdiction. Accordingly, it is unlikely that arbitrations will be delayed or frustrated by reason of interference by the national courts.

It should be noted that, pursuant to section 5, the AA applies with equal force to any arbitration to which the Federal Government or any state government is a party.

3.3.5 Are there any other legal requirements for arbitral proceedings to be recognisable and enforceable?

There are no legal requirements for arbitral proceedings to be recognisable and enforceable save for section 4(1) of the AA, which 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, and section 10 of the AA, which makes it mandatory for the courts to stay the court proceedings in favour of arbitration. The definition of an arbitration agreement is contained in section 9 of the AA and discussed in Section 3.6.1 below. Pursuant to section 38 of the AA, an award made in Malaysia or any other state which is a contracting party to the New York Convention is recognised and enforceable in Malaysia.

3.4 Procedural flexibility and control
3.4.1 Are specific procedures mandated in particular cases, or in general, which govern the procedure of arbitrations or the conduct of an arbitration hearing? To what extent can the parties determine the applicable procedures?

Pursuant to section 21(1) of the AA, the parties are free to agree on the procedure to be followed by the arbitral tribunal subject to the provisions of the AA. Where the parties do not agree on a procedure, the arbitral tribunal may, subject to the provisions of the AA, conduct the
arbitration in such manner as it considers appropriate. In this regard, the power conferred upon the arbitral tribunal shall include the power to:

- Determine the admissibility, relevance, materiality and weight of any evidence.
- Draw on its own knowledge and expertise.
- Order the provision of further particulars in a statement of claim or statement of defence.
- Order the giving of security for costs.
- Fix and amend time limits within which various steps in the arbitral proceedings must be completed.
- Order the discovery and production of documents or materials within the possession or power of a party.
- Order the interrogatories to be answered.
- Order that any evidence be given on oath or affirmation.
- Make such other orders as the arbitral tribunal considers appropriate.

In any event, at all times, the parties shall be treated with equality and each party shall be given a fair and reasonable opportunity of presenting that party’s case (section 20, AA). This means that the arbitral tribunal must follow the rules of natural justice.

It is increasingly the norm that parties agree to adopt institutionalised rules in commercial disputes.

There are default legislative provisions governing procedures in the AA. These include:

- The application of Part III of the AA to domestic arbitrations.
- When a written communication is deemed to have been received.
- The procedure for the appointment and number of arbitrators.
- Challenge procedures.
- The power of the arbitral tribunal to grant interim measures.
- Determination of the seat of arbitration.
- Submission of statements of claim and defence.
- Hearing procedure.
- When is an arbitral proceeding deemed to have been commenced.
- Decision making by panel of arbitrators.

3.4.2 Are there any requirements governing the place or seat of arbitration, or any requirement for arbitral hearings to be held at the seat?

Pursuant to section 22 of the AA, the parties are free to agree on the seat of arbitration. However, if the parties fail to agree on the seat, the seat shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. There is no requirement that the arbitral hearings must be held at the seat. The parties are free to agree the place at which the arbitral hearings are to be held. Unless otherwise agreed by the parties, the arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents (section 22(3), AA). It is not uncommon for arbitral proceedings in Malaysia to be held at the KLRCA.

3.4.3 What procedural powers and obligations does national law give or impose on an arbitral tribunal?

The procedural powers and obligations that the national law give or impose on an arbitral tribunal are those set out in the AA. Amongst others, the arbitral tribunal has powers to grant interim measures pursuant to section 19 of the AA (discussed in Section 4.1 below). The arbitral tribunal also has the power to determine the challenge made to an arbitrator (section 15, AA), determine its own jurisdictions (section 18, AA), determine the rules of procedure (section 21, AA), determine the seat of arbitration (section 22, AA), determine the language of the arbitration (section 24, AA), decide on the admissibility of evidence, and so on. Unless otherwise agreed, an award must be reasoned.
3.4.4 Evidence

3.4.4.1 What is the general approach to the gathering and tendering of written evidence at the pleading stage and at the hearing stage?

Pursuant to section 21(1) of the AA, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitral proceedings. In international arbitrations, it is not uncommon for memorial-style directions to be adopted, with each party submitting sequentially its pleadings, witness statements, documents and experts’ reports. In domestic arbitrations, parties commonly adopt similar procedures to those followed by common law courts. This would involve the sequential exchange of pleadings, followed by the simultaneous exchange of documents, witness statements and experts’ reports. Increasingly, general discovery is not ordered, but parties are at liberty to seek specific discovery of relevant documents.

Unless parties agree otherwise, the arbitral tribunal must have an oral hearing at the request of either party. During the oral hearing, witness statements are generally taken as read and the witnesses will be tendered for cross-examination.

It is not uncommon for the evidence of the experts to be recorded subsequent to the evidence of the factual witnesses of both parties. At the close of the hearing, directions would normally be given as to the submissions of the post-hearing submission, replies to the post-hearing submission and submission on cost. Thereafter, if necessary, the arbitral tribunal may require the parties to appear before it for oral submissions before rendering its award.

The Malaysian Evidence Act 1950 does not apply to arbitration proceedings (section 2, Malaysian Evidence Act 1950). As such, it is not uncommon for international arbitrations to adopt the International Bar Association Rules on the Taking of Evidence in International Arbitration (revised in 2010) (IBA Rules on Evidence) and for domestic arbitration to use the IBA Rules on Evidence as a guide. Documents which are protected by legal professional privilege are generally not admissible as evidence.

3.4.4.2 Can parties agree the rules on disclosure? How does the disclosure in arbitration typically differ to that in litigation?

Yes, the parties can agree the rules on disclosure pursuant to section 21(1) of the AA. As mentioned in Section 3.4.4.1 above, it is not uncommon for international arbitrations held in Malaysia to adopt the IBA Rules on Evidence, which also set out procedures for disclosure. Generally, disclosure in arbitration is less extensive than in litigation.

3.4.4.3 What are the rules on oral (factual or expert witness) evidence? Is cross-examination used?

See Section 3.4.4.1 above. It is not uncommon for the evidence of expert witnesses to be recorded after the evidence of the parties’ respective factual witnesses. There have also been instances where the “hot-tubbing” method has been applied. Pursuant to section 21(3)(h) of the AA, the arbitral tribunal may order that the evidence be given on oath or affirmation. This may include evidence in the form of affidavits or sworn witness statements.

3.4.4.4 If there is no express agreement, what powers of compulsion are there for arbitrators to require attendance of witnesses (factual or expert) or production of documents, either prior to or at the substantive hearing? To what extent are national courts willing or able to assist? Are there differences between domestic and international arbitrations, or between orders sought as against parties and non-parties?

Pursuant to section 29 of the AA, any party with the approval of the arbitral tribunal may apply to the High Court for assistance in taking evidence. In granting such assistance, 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. Such an order can be sought against a party or non-party to the arbitral proceeding. This applies to both domestic and international arbitrations.

3.4.4.5 Do special provisions exist for arbitrators appointed pursuant to international treaties (that is, bilateral or multilateral investment treaties)?

No.

3.4.5 Are there particular qualification requirements for representatives appearing on behalf of the parties in your jurisdiction?

There are no particular qualification requirements for representatives appearing on behalf of parties in Malaysia. The parties can be represented by foreign lawyers, who need not be admitted to the local Bar.

However, foreign lawyers may have to obtain a work visa to appear as counsel for arbitrations held in East Malaysia.

3.5 The award

3.5.1 Are there provisions governing an arbitral tribunal’s ability to determine the controversy in the absence of a party who, on appropriate notice, fails to appear at the arbitral proceedings?

Should a party without sufficient cause fail to appear at a hearing or produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it (section 27(c), AA).

There are no express legal provisions in the AA dealing with late requests for adjournment of a hearing. It would entirely be a matter for the arbitral tribunal to decide in the proper exercise of its jurisdiction.

3.5.2 Are there limits on arbitrators’ powers to fashion appropriate remedies, for example, punitive or exemplary damages, specific performance, rectification, injunctions, interest and costs?

There are no limits on the arbitral tribunal’s powers to fashion appropriate remedies so long as the remedies are granted in accordance with the substantive law agreed between the parties and not against a party who is not a party to the arbitration. However, arbitral tribunals are generally reluctant to award specific performance or injunctive reliefs, preferring instead to award monetary compensation.

3.5.3 Must an award take a particular form? Are there any other legal requirements, for example, in writing, signed, dated, place stipulated, the need for reasons, method of delivery?

Pursuant to section 33 of the AA, an award shall be made in writing and signed by the sole arbitrator. Should the arbitral tribunal consist of more than one arbitrator, the signature of the majority of all members of the arbitral tribunal shall be sufficient provided that the reason for any omitted signature is stated.

The award shall also state its date and seat of the arbitration, and shall be deemed to have been made at that seat.

A duly signed copy of the award shall be delivered to each party. It is not uncommon for the award to be collected from the office of the sole arbitrator or presiding arbitrator if that is convenient for the parties, or delivered by courier to the parties’ respective solicitors. The award is normally not delivered to the parties until full payment of any outstanding sums payable towards the fees and expenses of the arbitrator(s) has been remitted. However, pursuant to section 44(5) of the AA, where an arbitral tribunal refused to deliver its award before the payment of its fees and expenses, the High Court may order the arbitral tribunal to deliver the award on such conditions as the High Court thinks fit.

Unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms pursuant to a settlement, any award given by the arbitral tribunal shall state the reasons upon which it is based.
3.5.4 Can an arbitral tribunal order the unsuccessful party to pay some or all of the costs of the dispute? Is an arbitral tribunal bound by any prior agreement by the parties as to costs?

Pursuant to section 44 of the AA, the arbitral tribunal is bound by any prior agreement by the parties as to costs.

If there is no agreement by the parties as to costs, the costs and expenses of an arbitration shall be at the discretion of the arbitral tribunal. Any party may apply to the High Court for the costs to be taxed where an arbitral tribunal fails to specify in its award the amount of such costs and expenses within 30 days of having been requested to do so. In the absence of an award or additional award fixing and allocating the costs and expenses of the arbitration, each party shall bear its own legal and other expenses, and an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.

Unless otherwise agreed by the parties, the losing party will generally bear the costs relating to and incidental to the arbitration proceedings. In fixing and allocating the costs and expenses of the arbitration, the arbitral tribunal may take into consideration any Calderbank offer (“without prejudice save as to costs”) that was made (section 44(2), AA). The Calderbank offer shall not be communicated to the arbitral tribunal until it has made a final determination of all aspects of the dispute other than the fixing and allocation of costs and expenses (section 44(3), AA).

3.5.5 What matters are included in the costs of the arbitration?

The words used in section 44 of the AA are “costs and expenses of an arbitration”. This would include all costs and expenses incidental to the arbitration proceedings that have been incurred by the parties, the arbitral tribunal and any arbitral institution. Normally, this would include:

- The fees and expenses of the arbitrators.
- The legal costs of the lawyers representing the parties.
- The fees of the expert witnesses.
- The expenses incurred by any arbitral institution.
- The venue rental.
- The transcript service provider’s fees and expenses.
- The expenses incurred by the parties in relation to the factual witnesses and expert witnesses.

In theory, costs may also include the costs of in-house counsel and management, though in practice such costs are rarely awarded.

3.5.6 Are there any practical or legal limitations on the recovery of costs in arbitration?

There is no practical or legal limitation on the recovery of costs in arbitration. However, if the party against whom costs are awarded refuses to comply with the award, the award will have to be registered as a judgment of the court before it can be enforced.

3.5.7 Are there any rules relating to the payment of taxes (including VAT) by foreign and domestic arbitrators? If taxes are payable, can these be included in the costs of arbitration?

The income earned by a domestic arbitrator is subject to income tax in Malaysia based on progressive tax rates (from 0% to 25%). At present, the income earned by a foreign arbitrator in Malaysia, who is a non-resident in Malaysia for tax purposes, is subject to income tax at a flat rate of 25%.

With effect from 1 April 2015, a new Goods and Services Tax Act 2014 (GST Act) will come into operation, replacing the existing sales tax and service tax legislation in Malaysia. This will inevitably have an impact on the fees payable on the supply of services by foreign and domestic arbitrators.

With this change in law, the supply of services in Malaysia by a domestic or foreign arbitrator shall be subject to goods and services tax (GST) at the prescribed rate (6% as at 2015). However, GST shall only be chargeable on the supply if the arbitrator is a GST-registered person.
Under the GST Act, the arbitrator (whether domestic or foreign) is liable to be GST-registered if he earns at least RM500,000.00 a year from the provision of taxable services in Malaysia. If the arbitrator is not GST-registered, he is not at liberty to collect GST.

It should be noted that GST is the liability of the person making the supply (that is, the arbitrator), unless there are provisions in the agreement passing the GST liability to the recipient. Further, where the agreement is silent on whether the fees payable are exclusive or inclusive of GST, the general legal position is that the fees shall be taken to be GST-inclusive.

To avoid any contentious issues, foreign arbitrators accepting appointments in arbitral proceedings in Malaysia should agree with the parties that any applicable GST shall be borne by the parties.

3.6 Arbitration agreements and jurisdiction

3.6.1 Are there form, content or other legal requirements for an enforceable agreement to arbitrate? How may they be satisfied? What additional elements is it advisable to include in an arbitration agreement?

Section 9 of the AA sets out the definition and form of an arbitration agreement within the meaning of the AA. Pursuant to section 9(1) of the AA, an “arbitration agreement” means 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. An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement (section 9(2), AA). It must be in writing, and is considered so where it is contained in:

- A document signed by the parties.
- An exchange of letters, telex, facsimile or other means of communication which provides a record of the agreement.
- An exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other (sections 9(3) and 9(4), AA).

An arbitration agreement can also be incorporated by reference (section 9(5), AA). A reference in an agreement to a document containing an arbitration clause shall also constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

Apart from the above, it is advisable for the arbitration agreement to expressly state:

- The number of arbitrators that would constitute the arbitral tribunal.
- The seat and venue of the arbitration.
- The qualification/criteria/experience that is required of the arbitrators.
- The rules of arbitration pursuant to which the arbitration is to be conducted should it be an institutionalised arbitration.
- The language of the arbitration.
- The law governing the arbitration agreement.

3.6.2 Can an arbitral clause be considered valid even if the rest of the contract in which it is included is determined to be invalid?

Pursuant to section 18(2) of the AA, an arbitration clause is an autonomous agreement, separate from the underlying contract. Thus the invalidity of the underlying contract does not ipso facto invalidate the arbitration clause.

3.6.3 Can an arbitral tribunal determine its own jurisdiction (“competence-competence”)? When will the national courts deal with the issue of jurisdiction of an arbitral tribunal? Need an arbitral tribunal suspend its proceedings if a party seeks to resolve the issue of jurisdiction before the national courts?
Yes, the arbitral tribunal may determine its own jurisdiction. The doctrine of competence-competence has been codified in section 18(1) of the AA, which provides that the arbitral tribunal may rule on its own jurisdiction. This is also consistent with Article 16 of Model Law.

Pursuant to section 18(1) of the AA, the arbitral tribunal may also rule on any objection with respect to the existence or validity of the arbitration agreement.

There are two types of plea that can be made to the arbitral tribunal. The first is a plea that the arbitral tribunal does not have jurisdiction (which shall be raised not later than the submission of the statement of defence) and the second is a plea that the arbitral tribunal is exceeding the scope of its authority (which shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings) (sections 18(3) and 18(5), AA). It should be noted that a party is not precluded from raising a plea that the arbitral tribunal does not have jurisdiction by reason of that party having appointed or participated in the appointment of the arbitrator.

The arbitral tribunal may rule on both pleas either as a preliminary question or in an award on the merits (section 18(7), AA). Where, in a jurisdictional challenge, the arbitral tribunal rules as a preliminary question that it does have jurisdiction, any party may within 30 days appeal to the High Court to decide the matter. No appeal shall lie against the decision of the High Court. While an appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award (sections 18(8), 18(9) and 18(10), AA).

The courts are unlikely to order a stay of the arbitral proceedings unless the arbitral tribunal has no jurisdiction.

3.6.4 Is arbitration mandated for certain types of dispute? Is arbitration prohibited for certain types of dispute?

Under national laws, arbitration is not mandated for any particular types of dispute. 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 (section 4(2), AA). Arbitration is prohibited if it is contrary to public policy (section 4(1), AA).

3.6.5 What, if any, are the rules which prescribe the limitation periods for the commencement of arbitration proceedings and what are such periods?

Section 30 of the Malaysian Limitation Act 1953 expressly provides that the Limitation Act and any other written law relating to the limitation of actions shall apply to arbitrations. In the absence of an agreement between the parties to refer a dispute to arbitration within a specified period, the general limitation period contained in the Limitation Act would apply.

Pursuant to section 6(1)(a) of the Limitation Act, the limitation period for an action founded on contract or tort would be six years from the date on which the cause of action accrued. Unless the parties have agreed to refer a dispute to arbitration within a specified period, in an action for contract or tort, the arbitration must be commenced within six years from the date on which the cause of action accrued. An arbitration is deemed commenced when one party to the arbitration serves the other party a notice requiring the other party to appoint an arbitrator or to agree to the appointment of an arbitrator, or, where the submission provides that the reference shall be to a person named or designated in the submissions, requiring the party to submit the dispute to the person so named or designated (section 30(3), Limitation Act). Some institutional rules may also impose procedural requirements before a notice of arbitration can be deemed to have been properly served.
If the parties have agreed to a specified period within which a dispute should be referred to arbitration, then such dispute must be referred to arbitration within that specified period unless extended by the High Court pursuant to section 45 of the AA. The High Court has the power to extend the time for commencing arbitration proceedings if it is of the opinion that, in the circumstances of the case, undue hardship would otherwise be caused. As mentioned in Section 2.3.1 above, unless excluded by the parties, section 45 applies to a domestic arbitration. Unless agreed to by the parties, section 45 does not apply to an international arbitration.

3.6.6 Does national law enable an arbitral tribunal to assume jurisdiction over persons who are not party to the arbitration agreement?
National law does not allow an arbitral tribunal to assume jurisdiction over persons who are not party to the arbitration agreement.

3.7 Applicable law
3.7.1 How is the substantive law governing the issues in dispute determined?
Section 30 of the AA draws a distinction between domestic and international arbitrations. Unless otherwise agreed by the parties, in the case of a domestic arbitration where the seat of arbitration is in Malaysia, the substantive law shall be the laws of Malaysia. In the case of an international arbitration, the substantive law shall be the law as agreed upon by the parties as applicable to the substance of the dispute. Failing agreement, the arbitral tribunal shall apply the applicable law as determined by conflict of laws rules. Malaysia generally follows the same conflict of laws principles as applied in other common law jurisdictions.

Any designation by the parties of the law of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of laws rules. The arbitral tribunal shall, in all cases, decide in accordance with the terms of the agreement, and shall take into account the usages of the trade applicable to the transaction. It is not uncommon in most legal systems for trade usages to be used as an aid to interpretation of contractual terms. The burden of proof lies on the party who wishes to rely on any particular trade usage.

3.7.2 Are there any mandatory laws (of the seat or elsewhere) which will apply?
The parties are free to agree on the seat of the arbitration pursuant to section 22 of the AA. See Section 3.4.2 above.

4. SEEKING INTERIM MEASURES IN SUPPORT OF ARBITRATION CLAIMS
4.1 Can an arbitral tribunal order interim relief? If so, in what circumstances? What forms of interim relief are available and what are the legal tests for qualifying for such relief?
An arbitral tribunal can order interim relief in relation to the subject matter of the dispute, and the order may only be addressed to the parties to the arbitration agreement. The power to grant interim relief is enshrined in section 19 of the AA. Unless the parties expressly agree otherwise, the arbitral tribunal has the power to order:

- Security for costs.
- Discovery of documents and interrogatories.
- Giving of evidence by affidavit.
- The preservation, interim custody or sale of any property which is the subject matter of the dispute.

The arbitral tribunal may also require any party to provide appropriate security in connection with the orders that are made.
The arbitral tribunal may also have the power to grant such other interim reliefs that have been agreed to by the parties whether in the arbitration agreement, pursuant to the rules of arbitration that are adopted or otherwise.

Unless agreed by the parties or provided for by the rules governing the arbitration, the procedures for applying such interim reliefs are at the discretion of the arbitral tribunal. In determining whether or not to grant a particular relief that has been sought for, the arbitral tribunal will apply the common law tests for such relief.

4.2 Have national courts recognised and/or limited any power of an arbitral tribunal to grant interim relief?

See Section 4.1 above.

The arbitral tribunal can grant interim relief after the constitution of the arbitral tribunal and during the arbitral proceedings (section 19, AA). On the other hand, the High Court can order interim measures, pursuant to section 11 of the AA, at any time from the time the arbitration agreement comes into existence up to the conclusion of the arbitral proceedings.

As both the High Court and the arbitral tribunal have the power to grant interim reliefs, an application should first be made to the arbitral tribunal unless such an order is necessary to bind third parties or to effectively enforce the relief in cases where it cannot be done by the order of the arbitrator. The powers granted to the High Court pursuant to section 11 are not meant to be oppressively invoked by a party to arbitration proceedings. They must be exercised with utmost care and circumspection to ensure and support the arbitration mechanism and not to do any act which will stifle the arbitral process. Section 11(2) of the AA provides that where a party applies to the High Court for an interim measure and the arbitral tribunal has already ruled on any matter which is relevant to that application, the High Court shall treat any findings of fact made in the course of such ruling by the arbitral tribunal as conclusive for the purposes of the application.

4.3 Will national courts grant interim relief in support of arbitration proceedings and, if so, in what circumstances?

Yes, the national courts will grant interim relief in support of arbitration proceedings, whether or not the seat of arbitration is in Malaysia. However, in granting the interim relief, the High Court should be mindful of section 8 of the AA, which expressly states that “No court shall intervene in matters governed by this Act, except where so provided in this Act”. Pursuant to section 11 of the AA, the High Court has the power to grant the following orders at any time from the time the arbitration agreement comes into existence up to the conclusion of the arbitral proceedings:

- Security for costs.
- Discovery of documents and interrogatories.
- Giving of evidence by affidavit.
- Appointment of a receiver.
- Securing the amount in dispute, whether by way of arrest of property, bail or other security pursuant to the admiralty jurisdiction of the High Court.
- The preservation, interim custody or sale of any property which is the subject matter of the dispute.
- Ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party.
- An interim injunction or any other interim measure.

See also Section 4.2.
4.4 Are national courts willing to grant interim relief in support of arbitration proceedings seated elsewhere?
Yes, see Section 4.3.

5. CHALLENGING ARBITRATION AWARDS

5.1 Can an award be appealed to, challenged in or set aside by the national courts? If so, on what grounds?
An arbitral award is final and binding, and the parties cannot appeal against the award. Where the seat of the arbitration is Malaysia, the award may be set aside by the High Court in the circumstances set out in section 37 of the AA, which is in pari materia to Article 34 of the Model Law. Article 34(1) of the Model Law, however, has been omitted from the AA.

Failure of an arbitrator to draw correct inferences is not sufficient to warrant the setting aside of an award. Further, the award is also in conflict with the public policy of Malaysia if the making of the award is induced or affected by fraud or corruption, or if a breach of the rules of natural justice occurred during the arbitration proceedings or in connection with the making of the award.

If section 41 of the AA applies to the arbitral proceedings, any party may, within 42 days of the publication and receipt of the award, refer to the High Court any question of law arising out of the award which substantially affects the rights of one or more other parties. The High Court may, on determination of such a reference:

- Confirm the award.
- Vary the award.
- Remit the award in whole or in part, together with the High Court’s determination on the question of law, to the arbitral tribunal for reconsideration.
- Set aside the award in whole or in part.

The High Court may also order the arbitral tribunal to state the reasons for its award should the award not, or not sufficiently, contain the arbitral tribunal’s reasons. Unless otherwise agreed, section 41 of the AA does not apply to an international arbitration held in Malaysia.

5.2 Can the parties exclude rights of appeal or challenge?
There is no right to appeal against the award. The position is not entirely clear, but it appears that the right to set aside the award cannot be excluded.

5.3 What are the provisions governing modification, clarification or correction of an award (if any)?
Pursuant to section 35 of the AA, within 30 days of the receipt of the award or any other period of time agreed upon by the parties, a party:

(a) upon notice to the other party, may request the arbitral tribunal to correct in the award any error in computation, clerical or typographical error or other error of similar nature; or
(b) upon notice to and with the agreement of the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

Should the arbitral tribunal consider the request made to be justified, it shall make the correction or give the interpretation within 30 days of the receipt of the request and such interpretation shall form part of the award. The arbitral tribunal may also correct any error of the type referred to in point (a) above on its own initiative within 30 days of the date of the award.

Further, a party may, within 30 days of the receipt of the award and upon notice to the other party, request the arbitral tribunal to make an additional award as to claims
presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within 60 days from the receipt of such request.

For the avoidance of any doubt, the arbitral tribunal may, where it thinks it necessary, extend the period of time within which it shall make a correction, interpretation or an additional award.

See Section 5.1 above.

6. ENFORCEMENT

6.1 Has your jurisdiction ratified the New York Convention or any other regional conventions concerning the enforcement of arbitration awards? Has it made any reservations?

Malaysia acceded to the New York Convention on 5 November 1985, with the following declaration:

“The Government of Malaysia will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State. Malaysia further declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Malaysian law.”

6.2 What are the procedures and standards for enforcing an award in your jurisdiction?

Awards that are made in respect of an arbitration where the seat of arbitration is in Malaysia (domestic awards) and awards that are made in respect of arbitrations where the seat of arbitration is not Malaysia (non-domestic awards) are enforceable pursuant to section 38 of the AA. For the enforcement of non-domestic awards, such awards must be an award of a state which is a party to the New York Convention.

In brief, the process of enforcement requires registration of the award as a judgment of the High Court. The application for enforcement is made ex parte, and is typically ordered as of right upon production of the arbitration agreement and a duly certified copy of the award (with a translation into English if in a foreign language). The order for registration of the award must be served on the respondent, who is given 14 days to apply to set aside the registration. Enforcement of the award is stayed pending the determination of the application to set aside the registration of the award.

Typically, an application for enforcement may be disposed of within six weeks at the ex parte stage. Legal fees may be approximately $10,000.00. If the respondent applies to set aside the award or the registration of the award, depending on the complexity of the issues raised in opposing the application:

- Proceedings could take between six months and a year before it is disposed of in the High Court.
- Legal fees could vary from $20,000.00 to $200,000.00.

Recognition or enforcement of an award, irrespective of the state in which it was made, may be refused only at the request of the party against whom it is invoked pursuant to section 39 of the AA. Section 39 of the AA is in pari materia to the Model Law save for the following that is stated in section 39(1)(a)(vi) of the AA:

“where that party provides to the High Court proof that 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 the AA from which the parties cannot derogate, or, failing such agreement, was not in accordance with the AA.”
6.3 Is there a difference between the rules for enforcement of “domestic” awards and those for “non-domestic” awards?

The enforcement procedures for both types of award are governed by section 38 of the AA and Order 69, Rule 8 of the Malaysian Rules of Court 2012. There is no procedural difference. However, only awards that are from states which are parties to the New York Convention can be recognised and enforced in Malaysia.

Pursuant to section 39(1)(a)(vii) of the AA, recognition or enforcement of an award may be refused if the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made. If an application for setting aside or suspension of an award has been made to the High Court on these grounds, the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security (section 39(2), AA).

Pursuant to Order 69, Rule 9 of the Malaysian Rules of Court 2012, an applicant may enforce a non-domestic award in the same manner as a domestic award if the non-domestic award has, under 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. LH-AG

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