The Asia-Pacific Arbitration Review

2019

Malaysia

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GAR Global Arbitration Review

Malaysia

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Summary

Malaysian arbitration law is underpinned by the Malaysian Arbitration Act 2005 (the 2005 Act). The 2005 Act, which came into force on 15 March 2006, repealed the Arbitration Act 1952 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985. The 2005 Act provides a legislative framework in support of international arbitration in line with generally recognised principles of international arbitration law. Initial teething problems arising from the language of the Act were addressed by the Arbitration (Amendment) Act 2011 (the 2011 Amendment Act).

The jurisprudence of the Malaysian courts has developed accordingly, demonstrating a firm commitment to minimising curial intervention. Moreover, the Malaysian courts readily draw on case law from other pro-arbitration jurisdictions, thereby demonstrating a transnational approach and sensitivity to the development of local law on the subject.

Complementing these developments is the Kuala Lumpur Regional Centre for Arbitration, newly rebranded as the Asian International Arbitration Centre (AIAC). The Kuala Lumpur Regional Centre for Arbitration was set up in 1978 by the Asian-African Legal Consultative Organization to provide a neutral venue in the Asia-Pacific region for the arbitration of disputes in relation to trade, commerce and investment. Today, it hosts and administers domestic and international commercial arbitrations, and offers other dispute resolution processes, such as adjudication and mediation. The centre is housed in purpose-oriented premises that contain all the trappings expected of a modern venue for international arbitration. In a similar vein, the AIAC's rules are comparable to those of other major arbitration institutions. The main set of rules – the AIAC Arbitration Rules – incorporates the UNCITRAL Arbitration Rules (as revised in 2010). The AIAC has a separate set of rules for expedited arbitrations (termed the Fast Track Arbitration Rules) as well as a set of rules that are specifically designed for the arbitration of disputes arising from commercial transactions premised on Islamic principles (the AIAC i-Arbitration Rules). A central feature of the AIAC i-Arbitration Rules is that they 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.

THE 2005 ACT

The primary source of law in relation to both international and domestic arbitration in Malaysia is the 2005 Act, as amended by the 2011 Amendment Act. The 2005 Act is modelled on the UNCITRAL Model Law on International Commercial Arbitration 1985 (the Model Law), with amendments as adopted in 2006. It also incorporates important articles from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 to which Malaysia is a signatory. As Malaysia is a common law jurisdiction, the 2005 Act is further supplemented by case law that interprets and applies its provisions. In this regard, the 2005 Act vests the power of judicial intervention in the High Court, which is itself defined under section 2 of the 2005 Act to encompass both the High Court of Malaya and the High Court in Sabah and Sarawak.[1]

Section 8 of the 2005 Act provides the foundation of the approach now taken by Malaysian law and the Malaysian courts to arbitration. It provides that '[n]o court shall intervene in matters governed by this Act, except where so provided in this Act'; thus espousing the Model Law philosophy of providing within the statute itself for all instances of potential court intervention in matters regulated by the statute.[2]

The 2005 Act distinguishes between international and domestic arbitration, with the more 'interventionist' sections of the 2005 Act applying only to domestic arbitrations. International arbitration is defined, in general accordance with the Model Law provisions, as an arbitration where:

- one of the parties has its place of business outside Malaysia;
- the seat of arbitration is outside Malaysia;
- the substantial part of the commercial obligations are to be performed outside Malaysia;
- the subject matter of the dispute is most closely connected to a state outside Malaysia; or
- the parties have agreed that the subject matter of the arbitration agreement relates to more than one state.3

Parties to a domestic arbitration are free to opt in to the non-interventionist regime. Likewise, parties to an international arbitration may opt in to the interventionist regime.

Party autonomy features strongly in the 2005 Act. Under the 2005 Act, parties are at liberty to make their own decisions on the seat of the arbitration,4 the substantive law applicable to the dispute,5the number of arbitrators6 and the procedure for their appointment, 7the time for challenge of an arbitrator, and, subject to the provisions of the 2005 Act, the procedure to be followed by the arbitral tribunal in conducting the proceedings. Section 30(1) of the 2005 Act provides for the arbitral tribunal in an international arbitration to decide the dispute in accordance with the law as agreed upon by the parties as applicable to the substance of the dispute. In the event that parties to an international arbitration fail to agree on the applicable substantive laws, the arbitral tribunal shall apply the law determined by the conflict of laws rules.8

However, one deficiency in the 2005 Act recently identified by the Federal Court is the lack of a power to award interest for the pre-award period. In Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals,9 the Federal Court held at [187] that under section 33(6) of the 2005 Act, an arbitrator can only award post-award interest, and not pre-award interest, unless specifically provided for in the arbitration agreement. The restriction in section 33(6) of the 2005 Act has been interpreted strictly, as in Kejuruteraan Bintai Kindenko Sdn Bhd v Serdang Baru Properties Sdn Bhd and another originating summons, 10 where the High Court held that even though the claims and counterclaims of the respective parties had dealt with the issue of pre-award interest, the effect of section 33(6) of the 2005 Act was to preclude the issue of pre-award interest being submitted to arbitration.

However, the High Court recognised that the saving provision in section 39(3) operated to preserve the rest of the award:11

> The part that is affected and infected with respect to the pre-award interest can be clearly and clinically severed or excised from the part of the Award that is intact, which integrity has not been compromised or contaminated in any way by the pre-award interest element.

THE ARBITRATION AGREEMENT AND THE JURISDICTION OF THE TRIBUNAL

Malaysia takes a broad approach to the construction of arbitration agreements. The Fiona Trust single-forum presumption – that 'rational businessmen are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal 12represents the law in Malaysia.13

The doctrine of kompetenz-kompetenz is also recognised in Malaysia. Section 18(1) of the 2005 Act provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.14 The doctrine has been applied by the courts in the cases of Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor,15 Chut Nyak Isham bin Nyak Ariff v Malaysian Technology Development Corp Sdn Bhd & Ors,15 and TNB Fuel Services Sdn Bhd v China National Coal Group Corp.16 Malaysian law also recognises the principle of separability; namely that the arbitration agreement is separate from the main contract in which it may be contained.18 An arbitration agreement therefore will not be invalidated because of, for example, an illegality invalidating the main contract.19

Section 10 of the 2005 Act allows a party to apply to the High Court for a stay of legal proceedings if the subject matter of the dispute is subject to an arbitration agreement. Section 10 of the 2005 Act makes it mandatory for the High Court to grant a stay unless the arbitration agreement is null and void, inoperative or incapable of being performed. Moreover, the Malaysian courts recognise the principle that it is for the arbitrators to first decide on questions of jurisdiction, and not the courts. In Press Metal Sarawak v Etiqa Takaful Bhd,-20the Federal Court specifically approved the following pronouncement of the Canadian Supreme Court in Dell Computer Corporation v Union des Consommateurs: 21

> In a case involving an arbitration agreement, any challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator in accordance with the competence-competence principle, which has been incorporated into art. 943 CCP. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception, which is authorized by art. 940.1 CCP, is justified by the courts'expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record. Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding.

The Federal Court also specifically approved the following propositions, taken from the Singapore cases of Dalian Hua Liang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd22 and Tjong Very Sumito v Antig Investments:23

> …if it was at least arguable that the matter is the subject of the arbitration agreement, then a stay of proceedings should be ordered.
>
> …if the arbitration agreement provides for arbitration of 'disputes' or 'difference' or 'controversies', then the subject matter of the proceedings in question would fall outside the terms of the arbitration agreement if (a) there was no 'disputes' or 'difference' or 'controversy' as the case may be; or (b) where the alleged dispute is unrelated to the contract which contains the arbitration agreement.

In the recent case of Asiagroup Sdn Bhd v PFCE Timur Sdn Bhd,[24]the High Court (at [24]) recognised the statutory power and jurisdiction of arbitrators to rule on their own jurisdiction, and affirmed the principle that even if the court had doubts concerning the existence of the arbitration agreement within a contract, it should lean in favour of granting a stay so that the dispute may be referred to arbitration in order to let the arbitrators first decide whether they had jurisdiction to arbitrate the dispute.

The last year has seen a number of decisions regarding the incorporation of arbitration agreements by reference. Malaysian law recognises the principle of incorporation by reference:[25]

> According to section 9(5) of [the 2005 Act], an arbitration agreement may come into existence by reference. . . the agreement itself need not have an arbitration clause in it as long as the agreement refers to an arbitration clause in another document and the agreement is in writing and the reference incorporates the said clause into the agreement. . .
>
> . . .There is no requirement that the arbitration agreement contained in the document must be explicitly referred to in the reference. The reference need only be to the document and no explicit reference to the arbitration clause contained therein is required.

In TH Heavy Engineering Bhd v Daba Holdings (M) Sdn Bhd (formerly known as Dugwoo (M) Sdn Bhd),[26] after an examination of the existing jurisprudence, the High Court synthesised the general principles. First, while case law is relevant, the determination of whether an arbitration agreement has been incorporated via reference is a matter of construction and turns on the facts of each particular case. Second, while no specific forms or words need be used to incorporate an arbitration agreement into a contract, and the document to be incorporated need not be signed by the parties, there must on the other hand be evidence of a clear intention to submit to arbitration. Third, where the document containing the arbitration agreement is specifically identified in the contract, either directly or indirectly, that is generally sufficient and the document need not be specifically attached to the contract. On the other hand, where a document is only referred to in general, broad and unspecific terms, attaching it to the contract would be prudent, as its absence might point to an absence of evidence of the parties' intent to arbitrate.

The decision in Thien Seng Chan Sdn Bhd v Teguh Wiramas Sdn Bhd & Anor[27]affirms that the document containing the arbitration clause need not be signed by the parties in order for it to be incorporated into the contract. The High Court also clarified how arbitration agreements

are to be construed when a contract contains multi-tiered dispute resolution clauses. Firstly, where a contract only expressly mentions mediation as a method of dispute resolution, but incorporates an arbitration agreement indirectly by reference to another document, the court will uphold the arbitration agreement:28

It is only too obvious that much as parties may want to first try to resolve their disputes through mediation, there may be times when resolution through mediation fail. Whilst hoping for the best, one must be prepared for the worst. The [incorporated arbitration agreement] takes over where mediation is terminated.

Secondly, where a contract provides that the parties agree to submit to the jurisdiction of the courts for the purpose of any action or proceedings arising out of the contract, this cannot be taken to preclude the operation of the arbitration agreement within or incorporated into the same contract:29

> The Court must proceed on the basis that the parties did not intend to contradict themselves in the same document expressing their contractual obligations and intentions. . .
>
> . . .There is thus no conflict in the 2 clauses but a complementarity leading to a convergence of interest and purpose where the aid of the Court shall be called upon if necessary for matters pending arbitration for example in cases of injunctive reliefs and even for matters after arbitration as in an enforcement of the award.

One notable exception to the court's power to grant a stay of proceedings under the 2005 Act is where a winding up petition has been presented against a respondent. In NFC Labuan Shipleasing I Ltd v Semua Chemical Shipping Sdn Bhd,30 the High Court found that:

- a winding-up petition is not a substantive claim that is contemplated by section 10 of the 2005 Act, but a statutory right that may be invoked and exercised at any time in accordance with the law on winding-up, and cannot be modified or diluted by section 10; and
- a winding-up petition is not a claim for payment, but a sui generis proceeding with different reliefs and end results from a civil proceeding subject to arbitration, and is therefore not susceptible to a stay pending arbitration.

THE SEAT OF ARBITRATION

In The Government of India v Petrocon India Limited,31 the Federal Court was faced with a question regarding the identification of the seat of arbitration in circumstances where the law applicable to the container contract was Indian law; but where the contract specified the 'venue' of the arbitration as Kuala Lumpur, while at the same time expressly providing that the 'arbitration agreement' was to be 'governed by' the 'laws of England'. The Court of Appeal had concluded that the juridical seat was London, because English law was chosen as the law of the arbitration.

The Federal Court disagreed and held that '. . . the seat of arbitration will determine the curial law that will govern the arbitration proceeding', and drew on English case law to come to the conclusion that '. . . there is a strong presumption that the place of arbitration named in the agreement will constitute the juridical seat.'32

The Federal Court expressly recognised that there was a distinction between the seat of arbitration for the purposes of identifying the curial law, and the physical or geographical place where the arbitration was held, considering that '[i]n the case of place of arbitration it can be shifted from place to place without affecting the legal seat of the arbitration'. The Court, however, held that the word 'venue' in the clause meant the juridical seat, reasoning that if it had merely been a reference to the geographical or physical seat, it would not have been necessary to have it inserted in the agreement; and that in any event the word 'venue' and 'seat' are often used interchangeably. Ultimately, however, the Federal Court did not overturn the decision of the Court of Appeal, as it accepted the argument of the respondent that, on the facts of the case, the parties had subsequently expressly agreed to change the seat of the arbitration to London.

THE APPOINTMENT OF ARBITRATORS

Sections 12 to 17 of the 2005 Act governs the appointment of arbitrators. The distinction between domestic and international arbitrations also determines the applicability of section 12(2) of the 2005 Act (found in Part II). Section 12(2) of the 2005 Act provides that in the event that the parties to the arbitral proceedings fail to determine the number of arbitrators, the arbitral tribunal shall consist of three arbitrators in the case of an international arbitration and a single arbitrator in the case of a domestic arbitration.

The default procedures for the appointment of arbitrators are provided for under section 13 of the 2005 Act. Parties are, however, free to determine the procedures that are to be adopted with regard to the appointment of arbitrators. Arbitrators are expected to disclose circumstances that may result in a conflict of interest, as provided in section 14 of the 2005 Act.

In the event that the parties are unable to agree on the appointment of arbitrators, either party may apply to the director of the AIAC to appoint the arbitrators. In the event that the director similarly fails to appoint the arbitrators, either party may then apply to the High Court for assistance in the appointments.

In the case of Sebiro Holdings Sdn Bhd v Bhag Singh,33 the Court of Appeal was confronted with the question of whether the KLRCA director's appointment of an arbitrator was susceptible to challenge. Before the High Court, the appellant had sought, but failed to terminate, the appointment of the respondent as arbitrator on the grounds that he lacked geographical knowledge of Sarawak, which was the place of performance of the underlying contract. In dismissing its appeal, the Court of Appeal noted that 'the power exercised by the Director of the KLRCA under subsections 13(4) and (5) of [the 2005 Act] is an administrative power' and therefore '[his function] is not a judicial function where he has to afford the right to be heard to the parties before an arbitrator(s) is appointed'.34 Following this, it was held that:35

> The Court cannot interpose and interdict the appointment of an arbitrator whom the parties have agreed to be appointed by the named appointing authority under the terms of the Contract, except in cases where it is proved that there are circumstances which give rise to justifiable doubt as the [arbitrator's] impartiality or independence or that the [arbitrator] did not possess the qualification agreed to by the parties.

On the facts, since there was no pre-agreement between the parties as to the arbitrator's qualification, the arbitrator could not be disqualified on the grounds argued by the appellant.

REPRESENTATION OF PARTIES AT ARBITRATION IN EAST MALAYSIA

In Samsuri bin Baharuddin & Ors v Mohamed Azahari bin Matiasin and another appeal,[36] the Federal Court held that the effect of section 8(1) of the Advocates Ordinance 1953, read with section 2(1)(a) and (b) of that statute, was to prohibit foreign lawyers, who do not have the right to practise law in Sabah, from representing parties to arbitration proceedings in Sabah.

INTERIM RELIEF

The scheme of the 2005 Act permits both the arbitrator and the courts to grant interim relief. Thus, section 19 of the 2005 Act permits arbitral tribunals to grant orders that include security for costs and discovery of documents. On the other hand, section 11 of the 2005 Act expressly confers powers on the High Court to make interim orders in respect of the matters set out in section 11(1)(a)–(h) of the 2005 Act, which include an order to prevent the dissipation of assets pending the outcome of the arbitration proceedings. Section 11(3) of the 2005 Act expressly provides that such powers extend to international arbitrations where the seat of arbitration is not in Malaysia.

The scope of the court's powers under section 11 of the 2005 Act was recently considered in Telekom Malaysia Bhd v Obnet Sdn Bhd [37] where the plaintiff sought discovery of confidential documents during the course of arbitration, but was refused by the arbitrator. The plaintiff then applied to the court for discovery of those documents under section 11 of the 2005 Act, which was resisted by the respondent on the grounds that:

- the court was bound by the arbitrator's finding of fact that discovery ought not to be allowed as grave injustice would be caused to the respondent;
- section 11 of the 2005 Act only provided for interim measures, and discovery was a permanent measure as the document could not be undisclosed once it was disclosed; and
- the court should not interfere with the arbitrator's procedure.

Firstly, the court took the view that the proper test that the arbitrator should have applied was whether the document was necessary for the fair disposal of the case. The obligation of confidentiality was a mere consideration, and would not be necessarily determinative of the application. Thus, the court was not bound by the supposed finding of fact of the arbitrator. Secondly, the court held that even though section 11 of the 2005 Act refers to interim measures, some of the specific orders that the court is empowered to make are not interim in nature. On a proper construction of the section, therefore, the legislature must have intended that the court should be empowered to make such orders whether or not their effect would be interim in nature or otherwise. Thirdly, the court agreed with the general position in law that an arbitrator is master of his own procedure, but emphasised that there were exceptions to this general principle, one of which was section 11 of the 2005 Act. Thus, the High Court dismissed the respondent's arguments and ordered discovery.

The case of Telekom Malaysia Bhd v Obnet Sdn Bhd is notable as it highlights the distinct nature of Malaysian law with respect to interim measures. The case is founded on the fact that section 11 of the 2005 Act contemplates the concurrent jurisdiction of the arbitral tribunal and the High Court with respect to certain interim measures. That the 2005 Act

provides for such concurrent jurisdiction is uncontroversial – indeed, as regards certain specific types of interim measure, it is clear from the 2005 Act that the High Court's powers are in fact more extensive than that of the Tribunal. However, the significance of Telekom Malaysia lies in the fact that the High Court seems to have considered that the statutory framework permitted the Court to reconsider an issue that had already been the subject of a determination by the Tribunal acting within its powers. It remains to be seen whether Telekom Malaysia will be endorsed by the higher courts.

AWARDS

Section 2(1) of the 2005 Act defines an award as a decision of the arbitral tribunal on the substance of the dispute and this includes any final, interim or partial award and any award on costs or interest. Section 36(1) of the 2005 Act further provides that all awards are final and binding. Pursuant to section 33 of the 2005 Act, an award should state the reasons upon which the award is based unless the parties have otherwise agreed or the award is on agreed terms. Section 35 of the 2005 Act allows the tribunal to correct any clerical error, accidental slip or omission in an award; it also permits the tribunal to give an interpretation of a specific point or part of the award upon request by a party.

Sections 38 and 39 of the 2005 Act address the recognition and enforcement of awards. While section 38 of the 2005 Act sets out the procedure for recognising and enforcing awards, section 39 of the 2005 Act sets out the grounds on which the recognition or enforcement of an award will be refused.

The grounds for setting aside an award, and for refusing recognition or enforcement, are drawn from article V of the New York Convention – a party seeking to set aside or seeking to resist recognition or enforcement must show that:

- a party to the arbitration agreement was under an incapacity;
- the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the state in which the award was made;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
- the award contains decisions on matters beyond the scope of the submission to arbitration;
- 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 2005 Act from which the parties cannot derogate), or, failing such agreement, was not in accordance with the 2005 Act; or
- 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.

An award may also be set aside or have its recognition or enforcement refused where the award is in conflict with the public policy of Malaysia; or on the ground that the subject

matter of the dispute is not arbitrable under Malaysian law. In this regard, section 4(1) of the 2005 Act expressly provides that 'any dispute that 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.'

Various cases illustrate that the prevailing judicial philosophy is to take an extremely restrictive approach to permitting setting aside applications. In Ajwa for Food Industries Co (Migop), Egypt v Pacific Inter-link Sdn Bhd & another appeal, the Court of Appeal explained that 'the court should be slow in interfering with an arbitral award. The court should be restrained from interference unless it is a case of patent injustice which the law permits in clear terms to intervene.'38 As regards the meaning of the term 'public policy' in this context, the courts have also been clear that the ground is extremely narrow and to be read restrictively. As stated by Lee Swee Seng J in Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd,39 '[a]n error of law or fact does not engage the public policy of Malaysia. . .'.40 In this regard, it is clear that the Malaysian courts do not equate public policy in this context with a wide conception of the public interest; rather, the courts have applied the following test:41

> Although the concept of public policy of the State is not defined in the Act or the model law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would 'shock the conscience' . . ., or is 'clearly injurious to the public good or . . . wholly offensive to the ordinary reasonable and fully informed member of the public' . . . or where it violates the forum's most basic notion of morality and justice. . .. This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law.42

A recent case in point is Sime Darby Property Berhad v Garden Bay Sdn Bhd.43 The High Court was faced with an application to set aside an arbitral award. The dispute concerned a landscaping and turfing project. The claimant in the arbitration was the contractor for the project, while the respondent was the employer. The tribunal had found the claimant to be liable for rectification works instructed by the contract administrator, but then held that the parties had, by conduct, accepted the retention sum as a mode to allocate funds for rectification works and sought to limit the amount recoverable by the employer to that amount retained. This, however, was not the position taken by either party.

The court set aside the award and held that '. . .if the Arbitrator had wanted to rely on her knowledge of what she understood to be the usual practice in construction contracts, then she should inform the parties about it and invite them to challenge such an understanding of usual practice.'4444 The court, however, pointed out that this was not done, and that the Arbitrator had thus decided an 'issue not at play and not pleaded and in that pejorative sense, an "invented issue" and thus was in breach of natural justice in not allowing the parties to be heard on this new issue.'45 Of significance is the High Court's view as to the test to be applied where there had been a breach of natural justice. The High Court considered that '[a]ny breach of natural justice not in the manner of a technical or inconsequential breach would be sufficient for the court to intervene under section 37(1)(b)(ii) read with section 37(2)(b) application to set aside.'46

However, the Court of Appeal (in Garden Bay Sdn Bhd v Sime Darby Property Bhd)47 subsequently allowed an appeal against the High Court's decision. The Court of Appeal placed emphasis on section 37(6) of the 2005 Act, which provides the High Court with the power to '. . .adjourn the proceedings . . . to allow the arbitral tribunal an opportunity to resume the arbitral proceedings.' The Court of Appeal considered that the effect of this sub-section, read in light of the other provisions of the 2005 Act, entailed that it was incumbent on a party applying to set aside an award to simultaneously move the court under section 37(6) of the 2005 Act. In other words, as a general rule, a party making an application to set aside an award must move the court to consider whether the award can be saved by a reference to the tribunal under section 37(6) of the 2005 Act:

> . . .it is not the court's function to set aside the award under section 37 . . . without giving an opportunity to the arbitral tribunal to deliver an enforceable award. Any parties who make an application under section 37 or section 42 without seeking appropriate direction pursuant to section 37(6), must be seen to be an abuse of process of court and must be dismissed. . .

The failure of the applicant to apply for a reference to the tribunal under section 37(6) of the 2005 Act was, in the view of the Court of Appeal, fatal to its case.

The decision is remarkable. It is founded in a robust conception of the statutory philosophy of judicial non-interference and the unique nature of the Malaysian statutory framework, and, as far as the authors can tell, has no parallel in UK, Hong Kong or Singapore jurisprudence. While jurisdictions such as Singapore recognise the power of the court hearing a setting aside application to suspend setting aside proceedings in order for the tribunal to be given the opportunity to eliminate the grounds advanced in support of the application (see, for example, JVL Agro Industries v Agritrade International Pte Ltd 48), it has never been suggested that it is mandatory for the applicant to move the court for such a suspension. Parties seeking to set aside an arbitral award under the Act ought know to be very cautious in making an application to set aside, without a simultaneous application for the court to direct the tribunal to cure the matter giving rise to the complaint; indeed, the Court of Appeal went so far as to suggest that a failure to couple a setting-aside application with a section 37(6) application could constitute an abuse of process. It remains to be seen whether the decision will be endorsed by the Federal Court.

In Intraline Resources Sdn Bhd v Exxonmobil Exploration and Production Malaysia Inc,49 the High Court commented that the mechanism of section 37 of the 2005 Act was not to be abused by applicants, and reiterated that the threshold for judicial intervention under section 37 of the 2005 Act was high:50

> . . .In order to uphold and respect party autonomy the Courts can only intervene in limited circumstances as defined in the statute, focusing on a fair process and on the right of the parties to the arbitration to a decision that is within the true ambit of their consent to have their dispute arbitrated, and plainly do not extend to the realm of vindicating the merits or correctness of the decisions of the arbitral tribunal. Courts cannot entertain setting aside applications which are in truth a manifestation of the desire of the regretful losing party in arbitration to be given another opportunity to argue the merits of its case.

It is also clear that the courts take a pragmatic approach to such applications, and will not be strung up by technicalities. This is clearly illustrated by the decision in Tridant Engineering (M) Sdn Bhd v Ssangyong Engineering and Construction Co Ltd.[51]

This was an appeal against a High Court decision to the effect that an award contained a decision on matters beyond the scope of the submission to arbitration. The respondent was the main contractor for a development in Johor. The appellant was a nominated subcontractor, who entered into two contracts with the respondent contractor, one for the installation of electrical services, and the other for extra-low voltage installation works. The dispute in the arbitration concerned a claim by the appellant for sums said to be due and owing. The respondent's position was that it was entitled to refuse payment on the basis of a 'pay when paid' clause in the contracts; and that in any event the appellant's claim was time-barred. The appellant's position was that a reasonable time to pay had lapsed and hence the respondent was liable to pay; as regards the limitation issue, the appellant's position was that time only started to run from the date reasonable steps had been taken by the respondent to be paid by the employer.

The arbitrator decided that the respondent's liability to pay was not contingent on the receipt of the sum from the employer. On the limitation issue, the arbitrator decided that there had been an acknowledgment of debt in a proof of debt filed with an insolvent entity who had an interest in the project, and that this resulted in a postponement of the limitation period pursuant to sections 26 and 27 of the Limitation Act 1953 (the Limitation Act).

The High Court decided that this latter aspect of the arbitrator's decision fell outside the scope of the reference to arbitration. It is noteworthy, in this regard, that the appellant had not placed any reliance on sections 26 and 27 of the Limitation Act in its pleadings.

The Court of Appeal reversed the decision of the High Court and noted that, although the relevant sections of the Limitation Act were not pleaded, the arbitrator had invited full submissions on the issue; moreover, there was no evidence that the respondent had protested against the arbitrator's introduction of the issue of postponement of the limitation period. Similarly, the respondent had not sought to introduce any further evidence.

The Court of Appeal considered, in this context, that the failure to plead was not fatal to the respondent's claims. There had been no breach of the rules of natural justice. Moreover, the Court of Appeal took an extremely pragmatic approach to the question of whether the issue had been sufficiently engaged on the pleadings:

> [32] . . .even though sections 26 and 27 of the Limitation Act 1953 were not formally pleaded, the pleadings as they stood were adequate to put the Respondent on notice the issue of postponement of the limitation period. It was undisputed that the defence of the Respondent in the alternative was that the Appellant's claim was time barred by virtue of the Limitation Act and once that issue of limitation was put on the table so to speak, the Appellant was fully entitled to avail of any means to rebut the defence of limitation.

The Court of Appeal in this context endorsed the following proposition, drawn from the Singapore decision in PT Prima International Development v Kempinski Hotels SA:[52]

> . . .any new fact or change in the law arising after a submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded.

The Federal Court has recently clarified in CTI Group Inc v International Bulk Carriers SPA53 that a party seeking to set aside an order made under section 38 of the 2005 Act cannot apply to set it aside under that section on the ground that there is no arbitration agreement in existence between the parties. An application for setting aside must be taken out under section 39 of the 2005, and a party seeking to do so can only rely on the grounds set out in section 39 of the 2005, and no other grounds.

Section 42(4) of the 2005 Act, which applies only to domestic arbitration unless the parties agree otherwise, provides a further avenue through which an award can be set aside. Upon the reference of a question of law arising out of an award to the High Court for its determination, the High Court has the power to, inter alia, set aside the award in whole or in part. However, in Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals,54 the Federal Court interpreted the scope of this power in a restrictive manner, holding that the proper test for judicial intervention is whether there is a question of law arising out of the award that substantially affects the rights of one or more of the parties. The court also dismissed other tests for illegality that had been cited by counsel, holding that section 42 of the 2005 Act must be read as it stands, and previous jurisprudence relating to the setting aside of awards, such as the case law developed around the repealed Arbitration Act 1952, cannot be applied to section 42 of the 2005 Act:55

> An award might or might not be perverse, unconscionable, unreasonable, and the like. But it only matters whether there is a question of law arising out of the award that substantially affects the rights of one or more of the parties. Under s 42, that is the only ground for the court to intervene. Perverse, unconscionable, unreasonable, and the like are not tests for the setting aside of an award.

Section 37(4) of the 2005 Act provides, inter alia, that an application for setting aside of an award may not be made after 90 days from the date that the award was issued. As was recently established in Triumph City Development Sdn Bhd v Kerajaan Negeri Selangor Darul Ehsan,56 this is a strict limit, and the court does not have an inherent jurisdiction to set aside an award even if an application is made out of time:57

> . . .If the parties are allowed to go to court to challenge arbitration awards even if it is made out of time, then there is no point for the parties to have undergone arbitration process . . . It defeats the very purpose of having arbitration as the chosen mode of dispute resolution contractually agreed to by the parties. This is the reason why the court should be strict in entertaining this kind of application.

CONCLUSION

Malaysia continues its growth as a centre for arbitration. The 2005 Act provides a coherent modern legislative framework in line with international norms and best practices. As it

stands, Malaysia has all the components in place to take off as a centre for international arbitration. Recent decisions of the country's domestic courts underscore the fact that the Malaysian judiciary is now distinctly pro-arbitration – as Datuk Professor Sundra Rajoo, director of the AIAC, has stated: '[t]he courts have been enforcing awards and more importantly, supporting awards. They give interim measures and they also support arbitral awards and applications from arbitrations that are seated outside Malaysia.'58

Given the current arbitral landscape and the progressive and innovative approach taken by the AIAC in promoting Malaysia as a cost-efficient centre for dispute resolution, the country is poised to tap into the significant growth of international arbitration in the Association of Southeast Asian Nations and Asia-Pacific region. The right foundations are in place, and the future remains bright.

Endnotes

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