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The Baker McKenzie **International Arbitration Yearbook**

Malaysia

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A. Legislation and rules

A.1 Legislation

Arbitration law in Malaysia is governed by the Arbitration Act 2005 (AA). This came into force on 15 March 2006, and repealed the outdated Arbitration Act 1952. In a significant departure from its original framework, the AA is modeled on the UNCITRAL Model Law. [2]

Malaysia has also been a signatory to the New York Convention since 1985. The New York Convention was passed into domestic law in Malaysia through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985. However, the 1985 Act was also repealed on 15 March 2006, as the AA now sets out a uniform procedure for the recognition and enforcement of both local and foreign arbitral awards.

Consistent with the Model Law, the AA distinguishes between domestic and international arbitrations. An "international arbitration" is defined in the same way as it is defined in the Model Law. Unlike Article 1(2) of the Model Law however, Section 3 of the AA provides generally for the application of the Act to domestic and international arbitrations only where the seat of arbitration is in Malaysia, with no exceptions.

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[2] Original 1985 version.

In 2008, the High Court had the opportunity to interpret Section 3 of the AA in *Aras Jalinan Sdn Bhd v. Tipco Asphalt Public Company Ltd. & Ors*.[3] The *Aras Jalinan* case involved an application by the plaintiff for an interim injunction pending the determination of an arbitration between the parties in Singapore. In opposing this application, the defendants argued that the court had no jurisdiction to grant the orders sought, as the seat of arbitration was in Singapore, citing Sections 3 and 8 of the AA.[4]

The High Court agreed with the defendants and dismissed the plaintiff's application. It held that on a strict construction of Section 3 of the AA, read together with the provision on the restricted extent of court intervention in Section 8 of the AA, the High Court had no inherent or residual powers to intervene in arbitrations where the seat was outside Malaysia. It was also held that such jurisdiction could not be conferred by the agreement of the parties.

The effect of the *Aras Jalinan* decision, which was approved by the Court of Appeal in an unreported decision, left in serious doubt the ability of the High Court to exercise any powers in aid of arbitrations seated outside Malaysia, including the power to observe Malaysia's treaty obligation to enforce all valid arbitration agreements by ordering a mandatory stay of parallel court proceedings brought in breach of such agreements.

The AA was subsequently amended to address the implications of the *Aras Jalinan* decision, and other shortcomings of the AA.[5] Key amendments that came into force on 1 July 2011 can be summarized as follows:

Clarification of Section 8 of the AA that all sources of jurisdiction of the courts other than the AA itself, including the inherent jurisdiction

[3] [2008] 5 CLJ 654.
[4] Section 8 deals with the extent of court intervention in matters governed by the AA.
[5] Arbitration (Amendment) Act 2011.

of the courts, are excluded, to clearly limit the ability of the courts to intervene in matters governed by the AA

Inclusion of express provisions in the AA on the application of the powers of the court to grant relief in aid of arbitration under Section 10 of the AA (stay of parallel court proceedings) and Section 11 of the AA (interim measures and other relief) to foreign-seated arbitrations

Introduction of specific provisions under Sections 10 and 11 of the AA to govern admiralty disputes in arbitration, such as provisions on the arrest of vessels and the securing of the amount in dispute

Removal of the ground that there is no dispute between the parties with regard to the matters to be referred to arbitration, as a reason for refusal to stay parallel court proceedings

Reinstatement of party autonomy in choice of governing law clauses for domestic arbitrations to enable parties to apply laws other than the laws of Malaysia

Additional requirement for the reference on questions of law arising out of an award that the question of law substantially affects the rights of one or more of the parties

The amendments reflected a clear policy decision by all major stakeholders to harmonize Malaysian arbitration laws with that of the international arbitration community in order to promote Malaysia as a regional center for arbitration in the Asia Pacific region.

A.2 Institutions, rules and infrastructure

The Kuala Lumpur Regional Centre for Arbitration (KLRCA) was established in 1978 under the auspices of the Asian-African Legal Consultative Organization (AALCO). The KLRCA was established to provide institutional support to domestic and international arbitration proceedings in Asia. It is a nonprofit, nongovernmental and independent international body. The KLRCA was given statutory recognition as the default appointing authority under the AA and

adjudication authority under the Construction Industry Payment and Adjudication Act 2012, which came into operation on 15 April 2014.[6]

The KLRCA Rules of Arbitration incorporate the entire UNCITRAL Rules (as revised in 2010) in Part II, with various Fee Schedules in Part III and additional rules designed by the KLRCA in Part I relating to, for example, to the appointment of arbitrators and the prescription of a three-month timeline from the closing of final oral or written submissions for delivery of the award by the arbitral tribunal.

The KLRCA Rules of Arbitration were last revised in 2013. Key amendments included the following:

- Introduction of emergency arbitrator provisions
- Provision to empower arbitrators to grant pre-award interest
- Provisions on consolidation of proceedings and concurrent hearings

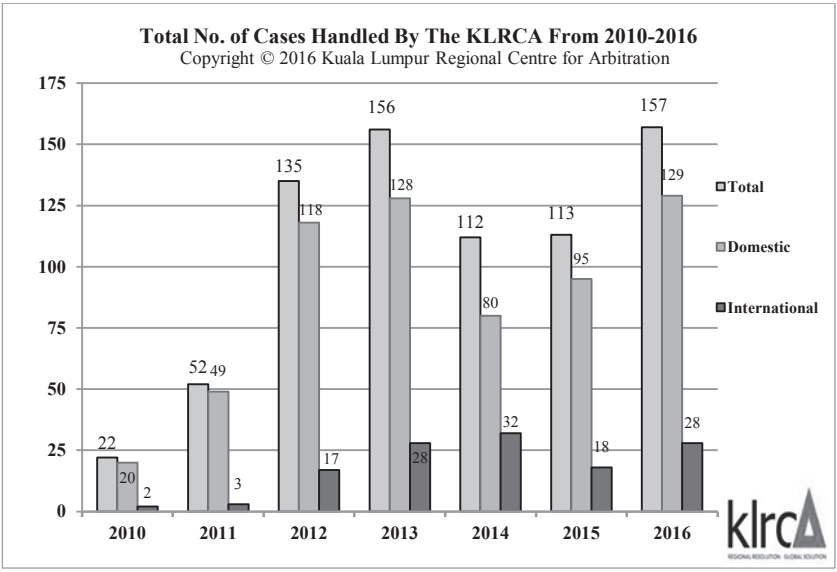
It was also in 2013 that the KLRCA introduced the KLRCA Fast Track Arbitration Rules and the Syariah-compliant KLRCA i-Arbitration Rules. As an administering institution applying these rules, the KLRCA handles a wide variety of commercial and non-commercial disputes,[7] including specialized disputes arising from

[6] The KLRCA is responsible for the setting of competency standards of an adjudicator, standard terms of appointment and fees of an adjudicator and providing administrative support for the conduct of adjudication according to the KLRCA Adjudication Rules and Procedures.

[7] The disputes handled include agency, aviation and airports, banking and financial instruments, company, concession agreements, defamation, employment, energy, mining, oil and gas, family and probate matters, healthcare, information technology and telecommunications, infrastructure, construction and engineering, insurance, intellectual property, investment, maritime, real estate, supply of goods and services, sports and entertainment, tenancy, tort and trust.

commercial transactions premised on Islamic principles and domain name disputes.[8]

The KLRCA handled a total of 747 cases between 2010 and 2016, as charted in the table below. The increasing trend in arbitration cases was broken only by the coming into operation of the Construction Industry Payment and Adjudication Act 2012 on 15 April 2014, which saw an exponential increase in adjudication cases totaling 689 cases in less than 3 years.



The KLRCA commenced operations in new and state-of-the-art facilities in Kuala Lumpur in October 2014. The Permanent Court of Arbitration has an alternative venue in Asia at these new premises. The KLRCA has also signed an agreement with the Switzerland-based International Council of Arbitration for Sport to serve as the official host of an alternative hearing center for the Court of Arbitration for Sport and a memorandum of understanding with the Asian Domain

[8] The Asian Domain Name Dispute Resolution Centre (Kuala Lumpur Office) has been operated and managed by the KLRCA since October 2009.

Name Dispute Resolution Centre and Hong Kong International Arbitration Centre to administer domain name disputes.

B. Cases

B.1 Limited role of the court in arbitration

The most recent notable Federal Court decision on the AA is *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Berhad.*[9] This case concerned an application for a stay of court proceedings under Section 10 of the AA, where the dispute related to a claim for insurance coverage for machinery breakdown and loss of profits due to a temporary shutdown of a plant following a power outage in Sarawak.

The appellant contended that there was no arbitration agreement in the placement slip for insurance coverage and that the dispute as to both liability and quantum of the insurance claim would, in any event, fall outside the scope of the arbitration agreement relied upon by the respondent in the expired policy.

The High Court found that there was a reference in the placement slip to the expired policy that contained the arbitration agreement, which satisfied the requirements of an arbitration agreement in writing, and that the claim fell squarely within the ambit of the arbitration agreement.

Section 9(5) of the AA defines the form of arbitration agreements. The Federal Court first dealt with the interpretation of Section 9(5) of the AA in *Ajwa For Food Industries Co. (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd.*[10] It further clarified in the *Press Metal* case that there is imputed knowledge that the terms of the arbitration agreement in a document referred to in an agreement are binding, as if they were written in the agreement.

[9] [2016] 9 CLJ 1.
[10] [2013] 7 CLJ 18.

In confirming the decision of the High Court and Court of Appeal to stay court proceedings pending arbitration, the Federal Court also usefully restated the following principles:

The court must mandatorily stay court proceedings if the sole requirement of Section 10 of the AA is satisfied, namely that there is an arbitration agreement between the parties that is not null and void or incapable of being performed.

In determining whether to stay court proceedings in favor of arbitration, the court is not concerned with whether there is in existence a dispute between the parties with regard to the matter referred, so long as it is within the scope of the arbitration agreement in order to make it operative.

The *Press Metal* case is an important one for arbitration law in Malaysia, as the Federal Court applied the following key tenets of internationally recognized arbitration law principles for the first time:

(a) An arbitration clause ought to be interpreted widely, based on its express terms and the intention of the parties, taking into consideration the commercial reality and the purpose for which the agreement was made and to give effect, so far as the language used by the parties in the arbitration clause would permit, to that purpose.[11]

(b) The threshold to ascertain the validity of an arbitration agreement and whether the subject matter of a claim falls within its ambit is low, and it is only in the clearest of cases that the court ought to make a ruling on the inapplicability of an arbitration clause.[12]

The decision underscores the pro-arbitration attitude of the judiciary in Malaysia and the welcome consistency and harmonization with international arbitration law. This is important, since it provides

[11] *Fiona Trust & Holding Corporation & Ors v. Privalov & Ors* [2007] 4 All ER 951.
[12] *Tjong Very Sumito & Ors v. Antig Investments Pte Ltd.* [2009] SGCA 41.

certainty and comfort to users choosing Malaysia as a seat of arbitration.

B.2 No foreign counsel in arbitration proceedings in Sabah and Sarawak

The concerted efforts to propel Malaysia as an arbitration center saw other developments in 2013, such as the relaxation of immigration requirements for foreign arbitrators entering Malaysia for short periods to conduct hearings, and amendments to the Legal Profession Act 1976 ("LPA").

It had never been an issue for foreign arbitration practitioners in Malaysia with a supportive Bar Council, but amid steps to liberalize the legal profession, restrictions remained that prohibited unlicensed persons from practicing law in Malaysia.[13] The amendments to the LPA expressly excluded the application of such restrictions in the case of:

- Foreign arbitrators
- Any person representing any party in arbitral proceedings
- Any person giving advice, preparing documents and rendering any other assistance arising out of arbitral proceedings in Malaysia[14]

However, the LPA only applies in Peninsular Malaysia and not in the Borneo states of Sabah and Sarawak in Malaysia.[15] Until the issue of whether foreign lawyers could practice as arbitration counsel in Sabah

[13] Section 37 Legal Profession Act 1976.
[14] Legal Profession (Amendment) Act 2013 (Act 1456) and Legal Profession (Amendment) Act 2012 (Act 1444) which came into effect on 3 June 2014.
[15] Sabah and Sarawak joined the Federation of Malaya in 1963 and the Federal Constitution accorded these states certain legislative autonomy and trade protection. The legal profession in Sabah and Sarawak is governed by the Advocates Ordinance 1953 (Sabah Cap. 2) and Advocate Ordinance Sarawak 1953 (Cap. 10) respectively.

was litigated in *In Re Mohamed Azahari Matiasin (Applicant),*[16] it was always assumed that there was a uniformity of practice for arbitration throughout Malaysia.

In 2011, Mohamed Azahari bin Matiasin applied to court for a declaration that his client could appoint a co-counsel from Kuala Lumpur for arbitration proceedings in Sabah. The High Court dismissed the application and ruled that only lawyers admitted to the Sabah Bar have the right to represent parties in arbitration proceedings. This was based on its interpretation of provisions in the Sabah Advocates Ordinance 1953, which gave such persons the "exclusive right to practice in Sabah."

On 24 September 2012, the Court of Appeal overturned the High Court's decision and ruled that foreign lawyers can appear in arbitration proceedings conducted in Sabah, without applying for permission to the High Court.[17] However, the Federal Court restored the High Court decision in a landmark unreported decision on 7 December 2015,[18] placing it beyond any doubt that all foreign lawyers, including lawyers from Peninsular Malaysia, are barred from appearing as counsel in arbitration proceedings in Sabah.

Since the corresponding provision in the Sarawak Advocates Ordinance 1953 is *in pari materia* with Section 8 of the Sabah Advocates Ordinance 1953, the same position also applies in Sarawak. Unless and until there is legislative change in Sabah and Sarawak, arbitration users should be especially circumspect when deciding on the seat and venue of arbitration in Malaysia where a potential dispute may have some connection to Sabah and Sarawak, and expressly exclude Sabah and Sarawak as a seat or venue in order to retain freedom of counsel.

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[16] [2011] 2 CLJ 630.
[17] *Mohamed Azahari bin Matiasin v. GBB Nandy v. Gaanesh & Samsuri Bin Baharuddin & 813 Ors* [2013] 7 CLJ 277.
[18] *Sabah to Lose Out on Arbitration Business*, http://www.dailyexpress.com.my/news.cfm?NewsID=105277

C. Trends and observations

With limited exceptions, the development of the law and practice of arbitration in Malaysia has continued in a positive trend, in line with the spirit of the UNCITRAL Model Law. The Malaysian judiciary has consistently adopted a non-interventionist approach to matters governed by the AA, eschewed judicial activism and applied a strict interpretation of the matters that are governed by the AA.

The *Aras Jalinan* case highlighted in Part A of this chapter is a good example of the way in which arbitration law is developing in Malaysia. While the court decisions may be unpopular, they spur the necessary legislative changes to continue the evolution of the AA. In the last edition of this *Yearbook*, two further examples were reported:

(a) In *International Bulk Carriers SPA v. CTI Group Inc.,*[19] the Court of Appeal set aside the registration of a foreign award under Section 38 of the AA due to noncompliance with the requirement of the section that the applicant produce the original arbitration agreement or a duly certified copy of the agreement.

(b) In *Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Anor Appea*l,[20] the Court of Appeal agreed with the High Court decision to set aside the award of pre-award interest by the arbitrator on the basis that the arbitrator acted in excess of jurisdiction in doing so, because Section 33(6) of the AA[21] only provided for post-award interest.

[19] [2014] 8 CLJ 854.
[20] [2015] 8 CLJ 58.
[21] Section 33(6) of the Arbitration Act 2005 provides as follows: "Unless otherwise provided in the arbitration agreement, the arbitral tribunal may: (a) award interest on any sum of money ordered to be paid by the award from the date of the award to the date of realisation; and (b) determine the rate of interest."

Further amendments to the AA are under development. This trend is expected to continue as the sophistication of arbitration law continues to develop with the increase in Malaysian-seated international arbitrations.