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## Malaysia

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### A. Legislation and rules

#### A.1 Legislation

International arbitration in Malaysia continues to be governed by the Arbitration Act 2005, to which no legislative amendment has been made since July 2011.

#### A.2 Institutions, rules and infrastructure

The Kuala Lumpur Regional Centre for Arbitration (KLRCA) Arbitration Rules were revised in 2017, effective from June 2017, to improve efficiency and quality in the conduct of the KLRCA-administered arbitrations, by introducing more cost and time effective procedural mechanisms.

The revisions to the KLRCA Arbitration Rules are as follows:

- (a) An increase of the non-refundable registration fee from USD 500 to USD 795 for international arbitration, and from RM 1,000 to RM 1,590 for domestic arbitrations (Rule 2(d)).
- (b) A notice of challenge to an arbitrator shall be accompanied by a non-refundable fee amounting to USD 5,300 in international arbitration and RM 10,600 in domestic arbitration, payable by the party who challenges the arbitrator (Rule 5(4)), where previously the director of the KLRCA could fix the costs of the challenge and direct by whom and how such costs should be borne.

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- (c) The arbitral tribunal is empowered to conduct the arbitration in such manner as it deems appropriate, where it may direct the following unless otherwise agreed by the parties (Rule 6):
- (i) limit or extend the time available for each party to present its case;
  - (ii) conduct such enquiries as may appear to the arbitral tribunal to be necessary or expedient, including whether and to what extent the arbitral tribunal should take the initiative itself in identifying relevant issues applicable to the dispute;
  - (iii) conduct enquiries by inviting parties to make their respective submissions on such issues;
  - (iv) order the parties to make any property items, goods or sites in their possession or control, which the arbitral tribunal deems relevant to the case, available for inspection;
  - (v) order any party to produce any documents in its possession or control which the arbitral tribunal deems relevant to the case, and to supply these documents and/or copies to the arbitral tribunal and to the other parties; and
  - (vi) decide whether or not to apply any rules of evidence as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion, and to decide the time, manner and form in which such material should be exchanged between the parties and presented to the arbitral tribunal.
- (d) The arbitration is deemed to have taken place at the seat of arbitration even if it is held elsewhere than the seat of arbitration, unless otherwise agreed by the parties (Rule 7(3)).



- (e) There are extensive provisions on the procedure to add additional parties, whereas the old rules only made provision for the addition of parties in Article 17(5) of the previous KLRCA UNCITRAL Arbitration Rules (Rule 9).
- (f) The director is empowered to consolidate two or more arbitration proceedings upon the request of any party to an arbitration or if he/she deems fit, if the criteria for consolidation is met by having regard to relevant circumstances (Rule 10), whereas previously the arbitral tribunal only had power to order consolidation of arbitration proceedings if the parties agreed to confer such power on the arbitral tribunal.

## B. Cases

### B.1 The consideration to set aside an arbitral award

The ambiguous legal position of the grounds to set aside an arbitral award since the Arbitration Act 2005 came into force has finally been settled in the recent Federal Court decision in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals*<sup>3</sup>.

This case arose from a domestic arbitration where the arbitral tribunal made an award in favor of the respondent (ie, the claimant in the arbitration) against the appellant (ie, the respondent in the arbitration). Thereafter, the respondent applied for recognition and enforcement of the award, whereas the appellant referred a series of questions of law arising out of the award under Section 42 of the Arbitration Act 2005, one of which is whether the grounds to set aside an arbitral award developed under the previous Arbitration Act 1952 are applicable to Section 42 of the Arbitration Act 2005.

Prior to the Arbitration Act 2005, an award could be set aside on the grounds that (i) the arbitrator has misconducted themselves or the

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<sup>3</sup> [2017] MLJU 1726.

proceedings; or (ii) an arbitration or award has been improperly procured.<sup>4</sup> Nevertheless, the Malaysian common law also accepted the common law ground of “error of law on the face of the award” although there was no such provision made in the previous legislation.<sup>5</sup>

After the coming into force of the Arbitration Act 2005, the application to set aside an award has to be made within 90 days of the date on which the party making the application has received the award or of the date on which the request to correct or interpret an award is disposed,<sup>6</sup> and that too will only be allowed if one of the prescribed circumstances is fulfilled.<sup>7</sup> The circumstances envisaged are given below for easy reference:<sup>8</sup>

- (a) the party making the application provides proof that:
  - (i) a party to the arbitration agreement was under any incapacity;
  - (ii) 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 Malaysia;
  - (iii) 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;
  - (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

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<sup>4</sup> Section 24(2) of the Arbitration Act 2005.

<sup>5</sup> *Shanmugan Paramsothy v. Thiagarajah Pooimpatarsam & ors* [2001] 6 MLJ 305.

<sup>6</sup> Section 37(4) of the Arbitration Act 2005.

<sup>7</sup> Section 37(1) of the Arbitration Act 2005.

<sup>8</sup> Section 37(1) of the Arbitration Act 2005.



- (v) the award contains decisions on matters beyond the scope of the submission to arbitration; or
  - (vi) 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 this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or
- (b) the High Court finds that:
- (i) the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or
  - (ii) the award is in conflict with the public policy of Malaysia.

Nevertheless, Section 42 of the Arbitration Act 2005 provides that parties may refer to the High Court “*any question of law arising out of an award*” and the High Court can only dismiss such reference “*unless the question of law substantially affects the rights of one or more of the parties,*” where on determination, the High Court may confirm or vary the award, remit the award wholly or partly to arbitral tribunal for reconsideration, or set aside the award wholly or partly.

The Federal Court held that the common law ground of “error of law on the face of the award” and the considerations of “illegality,” “manifestly unlawful and unconscionable,” “perverse” and “patent injustice” are no longer applicable, and proceeded to hold that the only consideration is whether there is a question of law arising from the award and substantially affecting the rights of one or more of the parties.

The Federal Court also provided a non-exhaustive list of questions which constitute a “*question of law*” under Section 42 of the Arbitration Act 2005, which includes questions as to:

- (a) the law in relation to the identification of all material rules of statute and common law, the identification and interpretation of the relevant parts of the contract, and the identification of those facts that must be taken into account when the decision is reached;
- (b) whether the decision of the tribunal was wrong;
- (c) whether there was an erroneous application of law;
- (d) whether the correct application of the law inevitably leads to one answer and the tribunal has given another;
- (e) the correctness of the law applied;
- (f) the correctness of the tests applied;
- (g) the legal effect to be given to an undisputed set of facts;
- (h) whether the tribunal has jurisdiction to determine a particular matter (which may also come under Section 37 of the Arbitration Act (2005); and
- (i) construction of a document.

This non-exhaustive list of questions appears to undermine the finality of an award where a litigant who is dissatisfied with the award may seek to vary or set aside the award by referring the award to the High Court, so long as there exists a question of law which substantially affects the rights of one or more of the parties.

In hindsight, it may also be a relief to the aggrieved party who obtained an award with some form of error but would not have been able to seek relief under the previous law as the error of law on the



face of the award is not such that is “*patent and obvious as to render the award manifestly unlawful and unconscionable to subsist.*”<sup>9</sup>

Be that as it may, Section 42 is only applicable to domestic arbitration unless otherwise agreed by the parties in writing, and will only apply to international arbitration if it is so agreed by the parties in writing.

## B.2 Arbitrator’s power to award pre-award interest

The Federal Court in *Far East Holdings* also held that an arbitrator is only empowered to award post-award interest, as the Arbitration Act 2005 does not contemplate the award of pre-award interest, unless otherwise agreed in the arbitration agreement.

Therefore, it is pertinent to enlarge the power of the arbitral tribunal in the arbitration agreement to include the power to award pre-award interest.

After the Federal Court’s decision in *Far East Holdings*, the KLRCA revised Rule 12(10)(a) of the KLRCA Arbitration Rules to give the arbitrator discretion to award interest for the period between the time when the cause of action arose to the date of realization of the arbitral award, effectively empowering the arbitrator to grant pre-award interest.

However, Rule 12(10)(a) will only be applicable to arbitration agreements which adopt the 2017 revision of the KLRCA Arbitration Rules.

## C. Funding in international arbitration

The Arbitration Act 2005 is silent on whether arbitration funding is permissible.

However, it may be frowned upon under the doctrines of maintenance and champerty, where maintenance prohibits the provision of aid in litigation in which a person has no legitimate concern and without just

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<sup>9</sup> *SDA Architects (sued as a firm) v. Metro Millenium Sdn Bhd* [2014] 2 MLJ 627.

cause or excuse, and champerty prohibits the provision of aid in litigation in return for a share of the proceeds of the action.

In this regard, an agreement for arbitration funding may be regarded as maintenance and champerty, which is against public policy, and is therefore unlawful.<sup>10</sup>

Further, Section 112 of the Legal Profession Act 1976 prohibits an advocate from entering into an agreement that contemplates payment only in the event of success in the action.

Nevertheless, there are instances where arbitration funding was made but no issue on illegality was taken. In *Measat Broadcast Network Systems Sdn Bhd v. AV Asia Sdn Bhd*,<sup>11</sup> the Malaysian High Court took into consideration the evidence of arbitration funding as a basis to allow security for costs.

Therefore, it is unclear whether the funding of arbitration, be it domestic or international, is strictly prohibited.

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<sup>10</sup> Section 24 of the Malaysian Contracts Act 1950 and *Quill Construction Sdn Bhd v. Tan Hor Teng & Anor* [2006] 2 CLJ 358.

<sup>11</sup> [2014] 3 CLJ 915.