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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 major amendments were made following the Arbitration (Amendment) (No. 2) Act 2018 ("Amendment Act 2018"). As an update to the analysis of the Federal Court case of *Far East Holdings Bhd & Anor. v. Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals*[2] ("Far East Holdings") in the 2018 Arbitration Yearbook, the lacuna in respect of pre-award interest has now been rectified by section 10 of the Amendment Act 2018 such that the arbitral tribunal is now empowered by the act to grant pre- and post-award interest on any sums that are in dispute.

The Amendment Act 2018 had also introduced the following changes to the Arbitration Act 2005:

(a) inclusion of an emergency arbitrator in the arbitral tribunal and recognition of the orders and/or awards granted by an emergency arbitrator (section 2 and new section 19H);

(b) recognition of parties' right to choose any representative, not limited to just lawyers (new section 3A);

(c) enhancement of the court's power to not only look at the subject matter of the dispute in the event that the arbitration agreement is contrary to public policy, but also if the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia (section 4);

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[2] [2017] MLJU 1726.

(d) clarification of the definition and form of an arbitration agreement, including that an arbitration agreement should be in writing and the recognition of electronic communication (section 9);

(e) recognition of powers of the High Court and arbitral tribunal to grant interim measures (section 11, section 19 and new sections 19A-19J);

(f) restoration of parties' right to choose any law or rules of law applicable to the substance of a dispute and recognition of arbitral tribunal's right to decide according to equity and conscience, if expressly authorized by the parties (section 30);

(g) provisions ensuring confidentiality of arbitration and arbitration-related court proceedings (new sections 41A and 41B);

(h) reinforcement of principles of minimum court intervention and finality of arbitral awards by repealing sections 42 and 43 of the Arbitration Act 2005.

A.2 Institutions, rules and infrastructure

The Amendment Act 2018 renamed the Kuala Lumpur Regional Centre for Arbitration (KLRCA) to the Asian International Arbitration Centre (AIAC). As such, effective from 9 March 2018, the AIAC Arbitration Rules have replaced the KLRCA Arbitration Rules.

The revision of the AIAC Arbitration Rules are as follows:

(a) introduction of the power of the arbitral tribunal to award simple or compound interest on any sums that are in dispute (rule 6 (g));

(b) permission for parties to international arbitration to pay the arbitral tribunal's fees and administrative fees in currencies other than US dollars (schedule 1);

(c) incorporation of specific standard definitions such as international arbitration (Guide to the AIAC Arbitration Rules);

(d) introduction of joinder of third parties to the arbitration proceedings, which can be done through the consent of all parties to the dispute (including the third party) in writing or by proving that the third party is, *prima facie*, bound by the arbitration agreement (rule 9);

(e) provision of clear guidelines for consolidation of arbitral proceedings and concurrent hearings, such as the requirements for consolidation, the constitution of the arbitral tribunal and possible waiver of enforcement (rule 10);

(f) introduction of a technical review of awards (rule 12);

(g) creation of a code in relation to emergency arbitrators (schedule 3).

B. Cases

B.1 International Arbitration

The anomalous decision of the Court of Appeal in *AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Anor*[3] ("AJWA case") on the definition of international arbitration is conclusively determined in the case of *Tan Seri Dato' Seri Vincent Tan Chee Yioun & Anor v. Jan de Nul (Malaysia) Sdn Bhd*[4] ("Jan de Nul case").

The dispute began when Central Malaysian Properties Sdn Bhd ("CMP"), controlled by Tan Seri Vincent Tan, defaulted in its payment to Jan de Nul (Malaysia) Sdn Bhd ("JDN") in respect of a construction project in Johor. As a result, JDN commenced arbitration proceedings against Tan Seri Vincent Tan, who personally guaranteed

[3] [2013] 2 CLJ 395.
[4] [2018] 1 LNS 1615.

the performance of CMP, for the sum due to JDN for the work completed for CMP. Subsequently, CMP and Sofidra (the ultimate holding company of JDN), were added into the arbitration proceedings. CMP counterclaimed against JDN for damages resulting from JDN's breach of contract and negligence in connection with the reclamation failure incident, which had unfortunately resulted in the loss of life. The arbitral tribunal held that JDN had validly terminated the contract, but JDN had also breached the contract which resulted in the reclamation failure incident. The claims of both parties were allowed and were set off against each other, with JDN and Sofidra ordered to pay, jointly and severally, CMP approximately USD 660 million ("Award").

Both parties challenged the Award, applying to refer to questions of law arising out of the Award pursuant to section 42 of the Arbitration Act 2005 ("the Act"). Sofidra and JDN raised preliminary objections that section 42 of the Act is inapplicable in this case as the arbitration between the parties was an "international arbitration" within the meaning of section 2 of the Act. section 3(3) of the Act provides that section 42 of the Act (which is contained within part III of the Act) has no application unless the parties had agreed in writing for it to be applicable.

Section 42 of the Act essentially allows for the court's intervention by allowing the parties to refer to the court on questions of law arising out of an arbitral award. The court then had powers to confirm, vary, set aside, or to remit the award to the tribunal for reconsideration.

The counsel for Tan Sri Vincent Tan and CMP had relied on the AJWA case to support their contention that section 42 is applicable. In the AJWA case, the Court of Appeal held that section 42 of the Act is may be relied on if the arbitration agreement is governed by Malaysian law.

The Federal Court, however, reversed the AJWA decision and held that, notwithstanding that the agreement adopts Malaysian law as the

governing law of the contract, such cannot be interpreted and equated to an agreement to include part III (and section 42) of the Act.

While this decision clarifies this point of law and ensures certainty, section 42 of the Act had been deleted by the Amendment Act 2018. Currently, the only recourse against an arbitral award is a setting-aside action under section 37 of the Act, which is contained within part II of the Act and will apply irrespective of it being a domestic or international arbitration.

B.2 Recourse against arbitral award

The dispute in the Jan de Nul case had also given rise to an appeal by JDN and Sofidra to set aside the Award under section 37 of the Act.

In dismissing JDN and Sofidra's appeal and upholding the decision of both the High Court and the Court of Appeal, the Federal Court affirmed the distinction between a section 37 application and a section 42 application held by the Court of Appeal in *Petronas Penapisan (Melaka) Sdn Bhd. v. Ahmani Sdn Bhd*[5] ("Petronas Penapisan"). In the Petronas Penapisan, it was held that a section 37 application relates to the award making process while a section 42 application relates to the award itself i.e. whether the award contains an error that substantially affects the rights of one or more of the parties.

While the Federal Court declined to comment if the test for the intervention of the court under section 37 of the Act is "one where the award suffers from patent injustice and/or where the award is manifestly unlawful and unconscionable," the court nevertheless explained that the test for intervention that was rejected in the Far East Holdings, i.e. "patent injustice" and "manifestly unlawful and unconscionable," applies only to a section 42 application and not a section 37 application, as the case may be.

[5] [2016] 3 CLJ 403.

In any case, with section 42 of the Act repealed, it is certain that parties may only seek the courts' intervention in very limited circumstances, that is when:

(a) the limited circumstances under section 37 of the Act are fulfilled;

(b) the subject matter of the dispute in the event that the arbitration agreement is contrary to public policy; or

(c) the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia.