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Malaysia
International Arbitration

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This country-specific Q&A provides an overview of international arbitration laws and regulations applicable in Malaysia.

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Malaysia: International Arbitration

1. What legislation applies to arbitration in your country? Are there any mandatory laws?

The Arbitration Act 2005 ("**AA 2005**") applies to arbitration in Malaysia. Parts I, II and IV of the AA 2005, comprising sections 1 to 5, sections 6 to 39 and sections 47 to 51, are of mandatory application in respect of both domestic and international arbitrations where the seat of the arbitration is in Malaysia.

Examples of mandatory legislative provisions that apply in Malaysia are as follows: –

a. Any dispute on which parties have agreed to arbitrate under an arbitration agreement can be determined by arbitration unless it is contrary to public policy or the subject matter of the dispute if not capable of settlement by arbitration under the laws of Malaysia (section 4, AA 2005).
b. Parties must be treated with equality and each party must be given a fair and reasonable opportunity of presenting that party's case (section 20, AA 2005).
c. Provisions which are aimed to promote the freedom of choice enjoyed by the parties. For example, the parties are free to: –
    - determine the number of arbitrators (section 12(1), AA 2005);
    - agree on a procedure for the appointment of the arbitrator(s) (section 13(2), AA 2005).
d. Agree on the procedure to be followed by the arbitral tribunal in conducting the arbitration (section 21(1), AA 2005).

A court must stay proceedings that are the subject of an arbitration agreement and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative and incapable of being performed (section 10(1), AA 2005)

2. Is your country a signatory to the New York Convention? Are there any reservations to the general obligations of the Convention?

Malaysia is a signatory to the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 ("**New York Convention**").

The Government of Malaysia will apply the New York 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 New York Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Malaysia law.

3. What other arbitration-related treaties and conventions is your country a party to?

Malaysia is also a party to the Comprehensive Investment Treaty between members of the Association of Southeast Asia Nations as well as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 ("**ICSID Convention**").

Malaysia is also a party to many Bilateral Investment Treaties ("**BIT**") with various countries, which typically include provisions for the protection of foreign investments and often provide for investor-state dispute settlement (ISDS) mechanisms, allowing investors to bring arbitration claims directly against the host state. These BITs help to foster a more stable and predictable environment for foreign investors in Malaysia by offering arbitration as a neutral forum for resolving disputes. Examples of key arbitration-related BITs that Malaysia is a part of include Malaysia – San Marino BIT (2012), Malaysia – Saudi Arabia BIT (2000), Malaysia – Romania BIT (1996) and others.

4. Is the law governing international arbitration in your country based on the UNCITRAL Model Law? Are there significant differences between the two?

The law governing international arbitration in Malaysia is based on the UNCITRAL Model Law. Sections 3 to 36 of the UNCITRAL Model Law are closely followed in Part II of the AA, i.e. sections 6 to 39 of the AA 2005. Parts III and 1V, however, contain new provisions which are not contained in the Model Law.

Part III provides for additional powers of the Malaysian High Court to intervene in arbitral proceedings and the confidentiality of information relating to arbitral

proceedings and awards. Part III of the AA 2005 contains provisions that only apply to all domestic arbitrations. The default position is that Part III does not apply to international arbitrations. The parties will have to by way of an agreement opt-in for Part III to apply to international arbitrations. Part IV covers miscellaneous issues such as the liability of arbitrators and arbitral institutions and the enforceability of arbitration agreements against bankrupts.

Further, despite Parts I and II closely following the UNCITRAL Model Law, specific powers are provided to arbitrators in several sections of the AA 2005, which are not found in the UNCITRAL Model Law. For instance, the AA 2005 empowers the arbitral tribunal to grant security for costs as an interim measure (see Section 19E of the AA 2005) and to give directions for the speedy determination of a claim if the claimant fails to proceed with the claim (see Section 27(d) of the AA 2005). The AA 2005 also provides for specific powers of the arbitral tribunal in conducting the arbitration, which includes drawing on its own knowledge and expertise, ordering for the provision of further particulars, the granting of security for costs, fixing and amending time limits in which various steps in arbitral proceedings must be completed, ordering the discovery and production of documents or material within the possession or power of a party, ordering interrogatories to be answered, and ordering that any evidence be given on oath or affirmation (see Section 21 of the AA 2005).

The AA 2005 was amended in 2018 by two major amendments. Firstly, the 2018 amendments introduce a range of supplementary provisions which enable the arbitral tribunals to grant interim measures. For instance, through the newly introduced sections, i.e. 19A to 19J, the arbitral tribunals will now be able to issue interim measures to maintain or restore the status quo pending the determination of the dispute, to take action that would prevent or refrain from taking action that is likely to cause imminent harm or prejudice to the arbitral process, to provide a means of preserving assets out of which a subsequent award may be satisfied, to preserve evidence that may be relevant and material to the resolution of the dispute, or to provide security for costs of the dispute. However, such new powers do not exceed that of the courts, who retain additional powers to grant arrest of property or bail or other security in respect of admiralty proceedings (section 10(2A) of the AA 2005). Moreover, Section 19J of the AA 2005 provides that the Malaysian High Court has the power to grant interim measures in relation to arbitration proceedings, irrespective of whether the seat of arbitrations in Malaysia.

On 22 August 2023, the Asian International Arbitration Centre (Malaysia) ("**AIAC**") announced the publication of the AIAC Arbitration Rules 2023. The AIAC Arbitration Rules 2023 took effect from 24 August 2023. AIAC also announced the AIAC i-Arbitration Rules 2023 which also took effect from 24 August 2023.

One of the key changes in the AIAC Arbitration Rules 2023 is the re-separation of UNCITRAL Arbitration Rules from the AIAC Arbitration Rules. The UNCITRAL Arbitration Rules are now found under Part II of the AIAC Arbitration Rules 2023. In cases of conflict between the Rules under Part I and the UNCITRAL Arbitration Rules under Part II, the former will prevail.

AIAC also introduced Asian Sports Arbitration Rules which took effect from 06 October 2023.

This feature shows AIAC's approach to a more straightforward set of rules, supplemented with the more detailed UNCITRAL Arbitration Rules. Following this change, the AIAC Arbitration Rules now adopt the UNCITRAL Arbitration Rules in its entirety (to the extent that it does not contradict the Rules under Part I). This is in contrast to the AIAC Arbitration Rules 2021 in which only certain provisions of the UNCITRAL Arbitration Rules were incorporated by the AIAC.

5. Are there any impending plans to reform the arbitration laws in your country?

Prior to the 2018 Amendments to the AA 2005 ("**2008 Amendments**"), the courts had jurisdiction over arbitral awards under section 42 (References on questions of law) of the AA 2005. However, such jurisdiction was limited to domestic cases where the questions of law referred substantially affected the rights of one or more of the parties (this being a test introduced in the course of the 2011 Amendments). Moreover, due to a combined reading of sections 3(2), (3) and (4) of the AA 2005, section 42 of the AA 2005 would normally not have applied to international arbitrations, unless parties expressly agree otherwise n writing. The Federal Court, nonetheless, in Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and Other Appeals [2018] 1 MLJ 1 expanded the courts' jurisdiction in respect of any questions of law, thus undermining the principle of minimum court intervention. In view of the said Federal Court judgement, section 42 of the AA 2005 was repealed by the 2018 Amendments. With the deletion of section 42 of the AA 2005, the arbitral award, whether domestic or international, can now only be challenged under sections 37 and 39 of the AA 2005.

In August 2020, the Malaysian Bar Council proposed the

reinstatement of a 'modified' section 42 of the AA 2005 for reviewing domestic arbitral awards on questions of law. Similar to the position adopted by many other common law jurisdictions, the proposal is that Malaysia should provide the right to seek review of domestic arbitral awards on questions of law, subject to first obtaining leave of court to file any such challenge.

We also wish to highlight the passing of the Arbitration (Amendment) Bill 2024 ("**Arbitration Bill**") by the Senate on 24 July 2024 and by the House of Representative on 16 July 2024 which will be cited as the Arbitration (Amendment) Act 2024 ("**2024 Act**"). There are a few key changes to the AA 2005 proposed under the Arbitration Bill which include the introduction of third-party funding in arbitration, the introduction of the role of the President of the Asian International Arbitration Centre Court of Arbitration ("**AIAC Court**"), and automatic recognition of arbitral awards. The passing of the amendment will see the implementation of the restructuring initiative of the Asian International Arbitration Centre ("**AIAC**") aimed at enhancing AIAC's governance through the adoption of the separation of powers concept and comprehensive checks and balances mechanisms within AIAC's administrative system. The 2024 Act will be discussed further in the sections below.

6. What arbitral institutions (if any) exist in your country? When were their rules last amended? Are any amendments being considered?

There are several arbitral institutions in Malaysia, including the Institute of Engineers Malaysia ("**IEM**"), the Palm Oil Refiners Association of Malaysia ("**PORAM**") and the Malaysian Institute of Architects ("**PAM**"). The arbitration rules for IEM were updated in 2016. For PORAM, since the enactment of AA 2005, an extensive review exercise was conducted on the PORAM Rules of Arbitration and Appeal, where the revised rules took into effect from 1st January 2012. The PAM Arbitration Rules, on the other hand, were revised in 2019.

However, AIAC is the main arbitral institution in Malaysia. The AIAC Arbitration Rules were last revised in 2023. The AIAC Arbitration Rules 2023 took effect from 24 August 2023.

The recent revision includes significant changes to existing Malaysian arbitral practice and extends the AIAC's various efforts to improve the efficiency of arbitration. It also responds to the growing calls for enhanced cost and time savings and transparency in arbitration by introducing new procedures for summary determination, expedited procedure and the publication of AIAC arbitral awards.

The key revisions are, *inter alia*, highlighted as follows: –

a. The separation of AIAC Arbitration Rules and UNCITRAL Arbitration Rules. This allows the UNCITRAL Arbitration Rules to be adopted in their entirety to the extent that they do not conflict with the Rules.
b. In cases where the arbitrator is replaced, the arbitration proceedings shall resume at the stage where the replaced arbitrator ceased to perform his or her functions. This is unless the arbitral tribunal decides otherwise – Article 15 of the UNCITRAL Arbitration Rules under Part II of the AIAC Arbitration Rules 2023.
c. The period of time fixed by the arbitral tribunal for the communication of written statements should not exceed 45 days. This includes the statement of claim and statement of defence – Article 25 of the UNCITRAL Arbitration Rules under Part II of the AIAC Arbitration Rules 2023.
d. A party that is funded by a third party is obligated to disclose the existence of the funding and the identity of the funder. This obligation is continuous until the conclusion of the proceedings, where supervening facts so require or upon the request of the Arbitral Tribunal or the AIAC – Rule 12 of the AIAC Arbitration Rules 2023.
e. An arbitration is only commenced on the date which the AIAC receives the complete notice of arbitration which all the accompanying documents referred to in the said rule. This is as opposed to Rule 5.1 of the AIAC Arbitration Rules 2021 which provided for the commencement of an arbitration when the claimant delivers the notice of arbitration to the respondent – Rule 2(2) of the AIAC Arbitration Rules 2023.
f. The Fast Track Procedure requires that the award made within six months from the date of the constitution of the arbitral tribunal, unless otherwise agreed by parties. Any extension shall not exceed nine months, unless otherwise agreed by parties. This clear timeline is newly introduced and is not found under the AIAC Arbitration Rules 2021 – Clause 15 of Schedule 4 of the AIAC Arbitration Rules 2023.

7. Is there a specialist arbitration court in your country?

Pursuant to the Supplementary Agreement dated 20 February 2024 to the Host Country Agreement between the Government of Malaysia ("**GOM**") and the Asian-African Legal Consultative Organization ("**AALCO**") ("**Supplementary Agreement**"), Phase 2 of the

amendments to the agreement between GOM and AALCO relating to the AIAC in New Delhi on 15 March 2023 ("**the Principal Agreement**") intends to reflect the formation of the AIAC Court and the replacement of the position of the Director under Section 13 AA 2005 with the President of the AIAC Court. The Director's current function to appoint arbitrators will be assumed by the President and all appointments, decisions or any other acts made, given or done by the Director before the 2024 Act's coming into operation shall (on the date of coming into operation of the 2024 Act) be deemed to be made, given or done by the President. These reforms aim to delineate the operational responsibilities of AIAC, which now fall under the AIAC Board of Directors ("**BOD**"), to be overseen by the AIAC Court. The BOD shall also replace the existing Advisory Board.

8. What are the validity requirements for an arbitration agreement under the laws of your country?

Prior to the 2018 Amendments, section 9 of the AA 205 requires an arbitration agreement to be signed by the parties. However, the definition of "arbitration agreement" was explained by the 2018 Amendments so as to encompass agreements that are made or recorded by electronic means. The 2018 Amendments updated the AA 2005 to bring it in line with the latest revision of the UNCITRAL Model Law to make Malaysia a safe seat and to put the AA 2005 in line with other arbitration acts worldwide.

Section 9(1) of the AA 2005 defines an arbitration agreement as "*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 is required to be in written form (Section 9(3) AA 2005). An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means (Section 9(4) AA 2005). In addition, the requirement that an arbitration agreement be in writing is met by any electronic communication that the parties make by means of data message if the information contained therein is accessible so as to be useable for subsequent reference (Section 9(4A) AA 2005).

The position in relation to the formation of arbitration agreements will also be further clarified as Clause 4 of the Arbitration Bill inserts the words "or any other documents" into Section 9(4)(b) of the AA 2005, making it clear that the requirement in Section 9(3) AA 2005 will be satisfied if the arbitration agreement is embodied in any other documents exchanged between parties.

9. Are arbitration clauses considered separable from the main contract?

Section 18(2) of the AA 2005 provides that an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement and a decision by the arbitral tribunal that the agreement is null and void shall not ipso jure entail the invalidity of the arbitration clause.

A decision by an arbitral tribunal that the agreement is null and void does not invalidate the agreement to arbitrate (see Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor [2008] 1 MLJ 233 – High Court).

This position has also been applied in the case of Pandan Etika Sdn Bhd v Liang Builders Sdn Bhd [2019] 1 LNS 1978 where the Malaysian High Court gave effect to an arbitration clause that had been referentially incorporated into an agreement, regardless of the fact that the remaining aspects of the agreement could potentially be void for uncertainty. It is also germane to mention the recent Malaysian Court of Appeal case of Gise Kam Kwan International Trade Ltd v Antara Steel Mills Sdn Bhd [2024] CLJU 1870 where the Court held that the doctrine of separability would save and sustain an arbitration agreement even when the contract containing the agreement has been held to be null and void for illegality or that there has been frustration or termination or repudiation for a fundamental breach.

10. Do the courts of your country apply a validation principle under which an arbitration agreement should be considered valid and enforceable if it would be so considered under at least one of the national laws potentially applicable to it?

There has not been any Malaysian case law in respect of the validation principle in the context of an arbitration agreement. However, we are of the view that the Malaysian courts would find the recent Supreme Court of the United Kingdom decision in Enka Insaat Ve Sanayi AS v. OOO "Insurance Company Chubb [2020] UKSC 38 to be persuasive, i.e. that the Supreme Court recognised the validation principle applied if a putative governing law of the agreement, where none had been expressly chosen, would render all or part of the agreement ineffective. This

rationale is in line with the validation principle implied in the scheme of the New York Convention to uphold and give effect to arbitration agreements.

11. Is there anything particular to note in your jurisdiction with regard to multi-party or multi-contract arbitration?

There have been developments with regard to multi-party or multi-contract arbitration in respect of the arbitral institution rules in Malaysia.

Rule 10 of the AIAC Arbitration Rules 2023 specifically provides for consolidation of proceedings. At the request of a party, the Director of the AIAC ("**Director**") may decide to consolidate a newly commenced arbitration with a pending arbitration, if:

a. the parties agree to consolidate;
b. all the claims are made under the same arbitration agreement; or
c. where the claims are made under more than one arbitration agreement, the relief sought arises out of the same transaction or series of transactions and the Director considers the arbitration agreements to be compatible.

In deciding whether to allow a consolidation, the Director shall consult with the parties and the arbitral tribunal to consider: –

a. the stage of the pending arbitrations
b. the efficiency and expeditiousness of the proceedings; or
c. any other relevant circumstances.

Under Clause 6(a) of the Arbitration Bill, a new Section 13(3A) will provide that where there are multiple claimants and/or multiple respondents, the claimants shall jointly appoint one arbitrator, and the respondents shall jointly appoint one arbitrator. This provides clarification on the process for appointing a panel of three (3) arbitrators in a situation involving multiple claimants and/or multiple respondents.

12. In what instances can third parties or non-signatories be bound by an arbitration agreement? Are there any recent court decisions on these issues?

Previously, Rule 21.1 of the AIAC Arbitration Rules 2021 provides that any party to an arbitration or an additional party may, no later than the filing of the statement of defence and counterclaim, or at any time thereafter provided there exists exceptional circumstances, request one or more additional parties to be joined as a party to the arbitration where:

a. all parties to the arbitration and the additional party consent in writing to the joinder;
b. such additional party is prima facie bound by the arbitration agreement that gives rise to the arbitral proceedings; or
c. the participation of such additional party is necessary for the efficient resolution of the dispute and directly affects the outcome of the arbitral proceedings.

Nevertheless, the AIAC has changed the requirement for joinder in the AIAC Arbitration Rules 2023. Article 17 of the UNCITRAL Arbitration Rules (under Part II of the AIAC Arbitration Rules 2023) now provides that the arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided that such person is a party to the arbitration agreement.

This is unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. As such, mere consent by the parties in the arbitration and the additional party to the joinder is no longer sufficient.

In Malaysia, a non-party to an arbitration agreement cannot compel a party to arbitrate disputes under the arbitration agreement.

In the Federal Court's decision in Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors [2019] 5 MLJ 1 ("**Jaya Sudhir**"), the plaintiff, who was not a party to the arbitration proceedings, had sought an injunction to restrain arbitration proceedings against the second, third and fourth defendants, who were parties to a pending arbitration proceeding. The questions that arose in this case were whether a non-party can apply for an injunction to restrain arbitration proceedings to safeguard his proprietary rights was subject to the provisions of the AA 2005.

The Federal Court held that the AA 2005 should not apply to a party who does not fall within the scope of the legislation. Where a non-party applies for an antiarbitration injunction, the applicable test is that laid down in Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (i.e. whether there are serious issues to be tried, where the balance of convenience lies, and whether damages are an adequate remedy), and the higher test in J Jarvis & Sons Limited v

Blue Circle Dartford Estates Limited [2007] EWHC 1262 (i.e. that the injunction must not cause injustice to the claimant in the arbitration; the continuance of arbitration must be oppressive, vexatious, unconscionable and an abuse of process is of no relevance.

The Federal Court further held that where the dispute in the arbitration affects a non-party, priority should be given for the dispute to be litigated in court. In doing so, the Federal Court considered a 'fairness' test, in which the primary consideration on whether to grant the injunction to restrain the arbitration proceedings where the rights of a non-party thereto are involved, such that the non-party would not be left out in the cold and have his rights affected.

In this regard, the Federal Court may decline to give effect to the arbitration clause where the interests of third parties are involved or where there is a risk of parallel proceedings and inconsistent decisions arising out of the conduct of an arbitration.

The Jaya Sudhir case has been referred by the Court of Appeal in the case of Damai City Sdn Bhd v MCC Overseas (M) Sdn Bhd [2022] MLJU 2096. Damai City Sdn Bhd (Damai) was the employer of the main contractor, MCC Overseas (M) Sdn Bhd (MCCO), for the construction of three high-rise towers and a retail podium. However, MCCO defaulted in executing and completing the works in accordance to the Letter of Acceptance (LA) and the Conditions of Contract (CoC). Consequently, Damai issued a notice of default to MCCO and a notice of determination, which MCCO treated as a notice of repudiation.

Damai issued a demand under a performance bond issued by Malayan Banking Berhad (the Bank). An arbitration then commenced between Damai and MCCO pursuant to the arbitration clause found in the CoC.

The main issue in this proceeding related to MCCO's application to the High Court under Section 11(1)(a) and (b) of the Arbitration Act 2005 for an interim injunction to preserve the status quo, which the High Court granted including the call on the performance bond. On appeal, the Appellant argued that the High Court had no jurisdiction to grant such an injunction on the ground that the relief granted under section 11 of the Arbitration Act 2005 involved the Bank, which was a non-party to the arbitration agreement in the CoC between the Appellant and Respondent. Scrutinising the terms used in the CoC, the Court of Appeal agreed with the Appellant that the arbitration clause found therein was specifically framed in a way which precluded parties other than Damai and MCCO from being bound to it. The clause provided that,

"In the event that any dispute or difference arises to arbitration between the Employer and Contractor… then such disputes or differences shall be referred to arbitration."

The Court emphasised that, pursuant to the principle of autonomy, there must be "clear and specific words to make the bank a party to the arbitration clause". This was simply absent in the CoC, and hence the Bank cannot be bound by the arbitration clause. The appeal was therefore allowed.

The Jaya Sudhir case was also referred to and applied by the Malaysian Court of Appeal of Abd Rahman Soltan & Ors v Federal Land Development Authority & Anor and Other Appeals [2023] 7 CLJ 705.

13. Are any types of dispute considered non-arbitrable? Has there been any evolution in this regard in recent years?

Section 4(1) of the AA 2005 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 or the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia."

While there is no definite list of subject matters that are not capable of settlement by arbitration under Malaysian law, matters generally considered non-arbitrable include disputes in relation to matrimonial and family law matters, criminal offences (including bribery and corruption), winding-up and insolvency, competition laws and public interest.

Traditionally, the legal position on arbitrability was fluid, as case law reflected a balance between two competing public policies: the promotion of arbitration as a dispute resolution mechanism and the requirement for a mandatory collective insolvency process for companies unable to pay their debts as they fall due. Insolvency courts were often cautious in upholding arbitration agreements in such cases, concerned that enforcing them could undermine collective creditor action or delay insolvency proceedings.

However, following recent developments, namely the decisions in Swissray Asia Healthcare Co Ltd v Medical Services M Sdn Bhd [2024] MLJU 1382 ("**Swissray**") and Sian Participation Corp (in Liquidation) v Halimeda International Ltd (Virgin Islands) [2024] USPC 16 ("**Sian Participation**"), the legal position on this matter has been

significantly refined.

The Swissray decision marked a pivotal shift in Malaysian jurisprudence, with the Court of Appeal ruling that a petitioner is not required to refer a debt claim to arbitration when the debt is not genuinely disputed under a contract that contains an arbitration clause. The Court addressed whether the appropriate standard to apply in deciding whether to restrain the presentation of a winding-up petition was the higher "bona fide dispute" test or the lower "prima facie dispute" threshold, as established in the English Court of Appeal case Salford Estates (No. 2) Ltd v Altomart Ltd (No. 2) [2015] EWCA Civ 1575 ("**Salford Estates**") and the Singapore case BDG v BDH [2016] 5 SLR 997. The Court of Appeal in Swissray emphasized that judges should not "abdicate their responsibility" by avoiding inquiry into the genuineness of the dispute, and ultimately adopted the bona fide dispute standard, allowing creditors to proceed with a winding-up petition without the need for arbitration where the debt is not genuinely disputed.

In other words, Swissray clarified the Malaysian courts' approach in relation to disputed debt that is subject to arbitration. The judgement confirms that a creditor has the right to petition to the court to wind up a debtor without having to go through a potentially lengthy arbitration process where there is no genuine dispute of debt. This ruling also aligns Malaysia with the approach taken by the Privy Council in Sian Participation.

In Sian Participation, the Privy Council ruled that in liquidation proceedings, where a debtor disputes a debt which is subject to an arbitration agreement, the application will not be stayed or dismissed unless the underlying debt is disputed on "genuine and substantial grounds". The Privy Council rejected the more lenient approach taken in Salford Estates, which permitted stays of winding-up applications even when an insubstantial dispute was raised. The court also extended this reasoning to debts governed by exclusive jurisdiction clauses, noting that the underlying policies for arbitration clauses and exclusive jurisdiction clauses are identical. This decision imposes a higher threshold for debtors seeking to avoid liquidation by relying on an arbitration agreement or jurisdiction clause, while carefully balancing the public policy considerations of insolvency and arbitration.

In summary, these developments have overturned the previously settled law on the interaction between insolvency and arbitration, signaling a more defined and creditor-friendly approach in both Malaysia.

14. Are there any recent court decisions in your country concerning the choice of law applicable to an arbitration agreement where no such law has been specified by the Parties?

In Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic [2017] 9 CLJ 273, the Federal Court has established the general principle that where the seat of arbitration is Malaysia, the law applicable to the arbitration agreement is the law of Malaysia. This is the position in the absence of an express agreement or other contrary indications.

The general principle is that the law of the arbitration agreement should be determined by (i) express choice of the parties; (ii) failing which, by the implied choice of the parties and (ii) failing which, by the system of law having the closest and most real connection with the arbitration agreement.

It is also important to note that to avoid any uncertainty or complications on the law applicable to the arbitration agreement, Clause 5 of the Arbitration Bill introduces a new section 9A to the AA 2005 which provides that parties are free to agree on the applicable law. Absent such agreement, the law applicable to the arbitration agreement shall be the law of the seat of the arbitration. Section 9A also stipulates that the fact the parties agreed on the law applicable to the wider agreement (of which the arbitration clause is a part) does not constitute an express agreement that the same law should then apply to the agreement to arbitrate. Furthermore, Clause 12 of the Arbitration Bill acts as a saving clause, clarifying that the amendments under Clause 5 of the Arbitration Bill apply only to arbitration agreements made after the coming into force of the Arbitration Bill.

15. How is the law applicable to the substance determined? Is there a specific set of choice of law rules in your country?

Section 30(1) of the AA 2005 provides that the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.

For international arbitration, section 30(2) of the AA 2005 recognises the right of the parties to choose the applicable substantive law. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable [section 30(4) of the AA 2005].

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 [section 30(5) of the AA 2005].

As such, the law applicable to the substance would often be determined by the agreement between the parties, failing which the arbitral tribunal would apply the conflict of laws rules which it considers applicable.

In Malaysia, the conflict of law rules is set out in James Capel (Far East) Ltd v YK Fung Securities Sdn Bhd (Tan Koon Swan, Third Party) [1996] 2 MLJ 97, where at the first instance, the court will consider whether there is an express choice of the governing law.

In the absence of an express choice, the court will identify an implied choice such as:-

a. the presence of a choice of forum clause;
b. the use of terminology peculiar to a system of law;
c. where one party to a contract is a government; or
d. where both sides carry on business or live in the same country.

If an implied choice is so not found, the court will then adopt the system of law with which the transaction has the closest or most real connection with, by referring to relevant factors, amongst others:

a. the place of the performance of the contract;
b. the place where the contract was made; or
c. the site of the immovable property if such property is involved.

16. In your country, are there any restrictions in the appointment of arbitrators?

No. The parties to an arbitration agreement are free to decide on the arbitrator(s) and the number of arbitrators. It is explicitly provided in Section 13 of the AA 2005 that no person shall be precluded by reason of nationality from acting as an arbitrator, unless the parties agree otherwise.

17. Are there any default requirements as to the selection of a tribunal?

Section 12 of the AA 2005 provides for a tribunal of three arbitrators in international arbitrations, and one arbitrator in domestic arbitrations where the parties fail to determine the number of arbitrators.

Section 13(2) of the AA 2005 provides that the parties are free to agree on a procedure for appointing arbitrator or the presiding arbitrator.

Where the parties fail to agree on the procedure, and the arbitration consists of three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator as the presiding arbitrator (Section 13(3) of the AA 2005).

Where Section 13(3) above applies and (a) a party fails to appoint an arbitrator within thirty days of receipt of a request in writing to do so from the other party; or (b) the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment or such extended period as the parties may agree, either party may apply to the Director of the Asian International Arbitration Centre (Malaysia) for such appointment (Section 13(4) of the AA 2005).

Under section 13(5) of the AA 2005, where in an arbitration with a single arbitrator, (a) the parties fail to agree on the procedure referred to in section 13(2) of the AA; (b) the parties fail to agree on the arbitrator, either party may apply to the Director of the AIAC for the appointment of an arbitrator. Section 13(6) of the AA 2005 provides that where the parties have agreed on the procedure for appointment of the arbitrator, (a) a party fails to act as required under such procedure; (b) the parties, or two arbitrators, are unable to reach an agreement under such procedure; or (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the Director of the Asian International Arbitration Centre (Malaysia) to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.

The procedure for the appointment of arbitrator(s) can also be found in Rule 3 of the AIAC Arbitration Rules 2023 where the parties have agreed to arbitration under the AIAC Arbitration Rules.

18. Can the local courts intervene in the selection of arbitrators? If so, how?

Yes, but in very limited circumstances as provided under Section 13(7) of the AA 2005, where the Director of the AIAC is unable to act or fails to act under subsections (4), (5) and (6) within thirty days from the request, any party may apply to the High Court for such appointment.

In appointing an arbitrator the High Court shall have due regard to:-

(a) any qualifications required of the arbitrator by the agreement of the parties;

(b) other considerations that are likely to secure the appointment of an independent and impartial arbitrator; and

(c) in the case of an international arbitration, the advisability of appointing an arbitrator of a nationality other than those of the parties.

19. Can the appointment of an arbitrator be challenged? What are the grounds for such challenge? What is the procedure for such challenge?

Section 14(3) of the AA 2005 provides that:

"*An arbitrator may be challenged only if-*

(a) the circumstances give rise to justifiable doubts as to that arbitrator's impartiality or independence; or

(b) that arbitrator does not possess qualifications agreed to by the parties."

A party may challenge an arbitrator appointed by that party, or in whose appointment that party has participated, only for reasons which that party becomes aware of after the appointment has been made. (Section 14(4) of the AA 2005)

Section 15 of the AA 2005 states the challenge procedure as follows:

"*(1) Unless otherwise agreed by the parties, any party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or of any reasons referred to in subsection 14(3), send a written statement of the reasons for the challenge to the arbitral tribunal.*

(2) Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall make a decision on the challenge.

(3) Where a challenge is not successful, the challenging party may, within thirty days after having received notice of the decision rejecting the challenge, apply to the High Court to make a decision on the challenge.

(4) While such an application is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

(5) No appeal shall lie against the decision of the High Court under subsection (3)."

Similarly, under Rule 4 of the AIAC Arbitration Rules 2023, it provides that:

"*1. An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess any of the requisite qualifications on which the Parties agreed.*

2. A challenge to an arbitrator shall be made by sending a notice of challenge within 15 days of receipt of the notice of appointment of the challenged arbitrator, or within 15 days after the circumstances specified in Rule 4(1) became known to the Party making such challenge. The notice of challenge shall be in writing and shall state the grounds for the challenge.

3. An application to challenge an arbitrator (the "Challenge Application") shall be sent to the AIAC pursuant to Article 13(4) and shall consist of the following:

(a) a copy of the notice of challenge pursuant to Rule 4(2);

(b) confirmation that the notice of challenge has been sent to the other Parties, the arbitrator who is challenged, any other members of the Arbitral Tribunal, along with the proof of service of the notice of challenge on each of the above; and

(c) proof of payment of the non-refundable challenge fee, as prescribed in Schedule 2, Clause 5.1.

4. The Director may order the suspension of the arbitration until the challenge is resolved.

5. The Director shall decide on the challenge in writing and state reasons for the decision as soon as practicable."

20. Have there been any recent developments concerning the duty of independence and impartiality of the arbitrators, including the duty of disclosure?

The court has held that matters concerning an arbitrator's impartiality and independence must be determined by reference to the parties to and issues in the particular arbitration (MMC Engineering Group Bhd & Anor v Wayss & Freytag (M) Sdn Bhd & Anor [2015] MLJU 477). Itis not enough to accuse an arbitrator for lack of

independence or impartiality based on that arbitrator's lack of the same in another arbitration proceeding.

The MMC case is also referred in Low Koh Hwa @ Low Kok Hwa (practising as sole chartered architect at Low & Associates) v Persatuan Kanak-Kanak Spastik Selangor & Wilayah Persekutuan and another case [2021] 10 MLJ 262, where the High Court examined the arbitrator's duties of full and timeous disclosure of facts and circumstances which are likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. This case is set out in detail below.

21. What happens in the case of a truncated tribunal? Is the tribunal able to continue with the proceedings?

The situation of a truncated arbitral tribunal may be caused by various factors. It may arise when an arbitral tribunal during the course of the arbitral proceedings and before the rendering of the award does not remain the same at some point, meaning that one of the members of the tribunal is deceased, resigns or is removed either by agreement of the parties or by the Director pursuant to a challenge request in Rule 11 of the AIAC Arbitration Rules 2021.

In such a situation, a substituted arbitrator may be appointed pursuant to section 17 of the AA 2005. Any order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator shall not be invalid solely on the ground there has been a change in the composition of the arbitral tribunal, unless otherwise agreed by the parties (Section 17(3) of the AA 2005).

Rule 12.6 of the AIAC Arbitration Rules 2021 also provides that “Save where a Final Award has been made, the reconstituted Arbitral Tribunal shall, after consulting the Parties, determine whether and to what extent any previous hearings or other procedural steps in the arbitration remain effective."

22. Are arbitrators immune from liability?

Section 47 of the AA 2005 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."

In addition, Rule 22 of the AIAC Arbitration Rules 2023 provides that “Neither the AIAC, the arbitrators, the administrative secretary of the Arbitral Tribunal, nor any expert appointed by the Arbitral Tribunal are liable to any Party for any act or omission in connection with the arbitration, unless such act or omission constitutes wilful misconduct or gross negligence."

23. Is the principle of competence-competence recognised in your country?

Yes. Section 18(1) of the AA 2005 (which mirrors Article 16 of the Model Law) deals with the concept of competence-competence in Malaysia. Under section 18(1) of the AA 2005, the arbitral tribunal can rule on its own jurisdiction. The arbitral tribunal's powers to decide on its own jurisdiction or competence or the scope of its authority or the existence or validity of the arbitration agreement has been recognised by the Malaysian courts in Press Metal Sarawak Sdn Bhd v Etiga Takaful Bhd [2016] 5 MLJ 417 and TNB Fuel Services Sdn Bhd v China National Coal Group Corp [2013] 4 MLJ 857.

24. What is the approach of local courts towards a party commencing litigation in apparent breach of an arbitration agreement?

Pursuant to section 10 of the AA 2005, 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: –

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

This was confirmed by the Federal Court in Press Metal Sarawak Sdn Bhd v Etiga Takaful Bhd [2016] 5 MLJ 417 where it was held that in granting a stay under Section 10 of the AA 2005, the court only needs to consider whether there is in existence a binding arbitration agreement or clause between the parties, which agreement is not null and void, inoperative or incapable of being performed.

The issue of whether the request for an extension of time to file defence was a “taking any other steps in the proceedings" was dealt with in the recent Malaysian Court of Appeal case of Airbus Helicopters Malaysia Sdn Bhd v Aerial Power Lines Sdn Bhd [2024] 4 CLJ 243, where the Court effectively held that it would be too simplistic and indeed too strict an approach, steeped in technical traps, to say that a mere request for an extension of time to file defence would *ipso facto* tantamount to ‘taking any other steps in the

proceedings.' An approach consistent with the paradigm shift in encouraging parties to go for arbitration and to hold them to their bargain to so proceed in the arbitration agreement would resonate with the overall focus of section 8 of the AA 2005 which is that no court shall intervene in matters governed by this Act, except where so provided in this Act. The focus should be on upholding the bargain initially struck by the parties to elect arbitration in resolving their disputes and not litigation and to avoid being unduly fastidious with or fixated on technical non-compliance seeking to trip and trap the defendant into litigation when the declared intention in the arbitration agreement is loud and clear.

Besides granting a stay of the court proceedings, antisuit 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 local courts. This is premised on the rationale that strong reasons are required to displace the contractual obligation entered into in relation to an arbitration clause (Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors [2019] 5 MLJ 1). In Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316, the Court of Appeal held that there is no doubt that a court has jurisdiction and power to grant an anti-suit injunction whenever the interests of justice call for or demand it.

Nonetheless, there are circumstances where the courts have had to decline to apply Section 10 of the AA 2005 to order a stay of the court proceedings, and to not compelthe parties to proceed with arbitration. Some of these circumstances are illustrated by the cases set out below.

For instance, in Jaya Sudhir (supra), where the case involves a non-party to the arbitration proceedings, the court held that the judicial policy of avoiding parallel proceedings, the risk of inconsistent findings and inconvenience to third parties, triumphs over the policy of upholding arbitration agreements.

In Protasco Bhd v Tey Por Yee And Another Appeal [2018] 5 CLJ 299, the Court of Appeal observed that section 10 of AA 2005 has no application on the stay of court proceedings sought by non-parties. However, the Court of Appeal has the discretion to exercise its inherent power to grant or refuse a stay as sought by non-parties. After considering the factual matrix of the case and balancing the relevant factors and interests of the parties involved, the Court ordered for the stay of the court proceedings only in relation to parties to the arbitration, on condition that the proposed arbitration proceed only after the resolution of the court proceedings in relation to non-parties the arbitration. The objective of this ruling is to achieve “a result which is manifestly just in all the circumstances of the case".

In Kebabangan Petroleum Operating Co Sdn Bhd v Mikuni (M) Sdn Bhd & Ors [2021] 7 CLJ 544, the Court of Appeal also had to consider the issue of non-parties to an arbitration agreement in the context of a stay application pursuant to Section 10 of the AA 2005.

In refusing the stay application sought by the respondents, the Court of Appeal took into consideration that the first respondent (who was a party to the arbitration agreement) had by conduct abandoned its right to refer the matter to arbitration when it failed to pay the deposit for arbitration proceedings, thus rendering the arbitration agreement inoperative. The respondents had also taken steps to proceed with the civil suit in preference to arbitration by making a striking out application. In addition, the Court of Appeal ruled that the court proceedings against the second to fifth respondents (who were the directors of the first respondent) should not have been stayed on the basis that they were not parties to the arbitration agreement between the appellant and the first respondent.

25. What happens when a respondent fails to participate in the arbitration? Can the local courts compel participation?

Parties are free to agree on the application of a set of rules published by an arbitration institution (Section 2(c) of AA 2005). Most arbitral institution rules include the consequences of default by the parties.

For example, Article 30 of the UNCITRAL Arbitration Rules (under Part II of the AIAC Arbitration Rules 2023) provides, inter alia, as follows:

Should a respondent fail to deliver its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations;

Should a party, duly notified under the AIAC Rules 2023, fails to appear at a hearing, without showing sufficient cause, the arbitral tribunal may proceed with the arbitration; and

Should a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so in accordance with the procedural order issued by the arbitral tribunal, without showing sufficient cause for

such failure, the arbitral tribunal may make the award on the evidence before it.

If the parties have not agreed to any arbitration rules relating to the consequences of default by the parties, Section 27 of AA 2005 provides for the manner in which the arbitral tribunal is to proceed in the event of a default by the parties, which are similar to those provided under the AIAC Arbitration Rules 2023.

Further, most arbitral institution rules require advance deposits for the costs of the arbitration and a respondent may also opt not to participate in the arbitration by refusing to pay such deposits. This may be due to the respondent's financial constraints or even a tactic employed by the respondent to frustrate the arbitration process. In this respect, Article 43 of the UNCITRAL Arbitration Rules (under Part II of the AIAC Arbitration Rules 2023) provides that, if the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or more of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

In this respect and pursuant to the Court of Appeal case of Kebabangan Petroleum Operating Co Sdn Bhd v Mikuni (M) Sdn Bhd & Ors [2021] 1 MLJ 693, should the arbitration proceedings be terminated pursuant to non-payment of the arbitration deposits by a respondent, it appears that a claimant may then proceed to pursue its claim against the respondent in the civil courts by reason that the arbitration agreement between the parties has become inoperative.

26. Can third parties voluntarily join arbitration proceedings? If all parties agree to the intervention, is the tribunal bound by this agreement? If all parties do not agree to the intervention, can the tribunal allow for it?

Generally, the arbitral tribunal cannot assume jurisdiction over individuals or entities that are neither parties to an arbitration agreement nor signatories to the contract.

The AA 2005 itself is silent on third party joinder. However, Article 17 of the UNCITRAL Arbitration Rules (under Part II of the AIAC Arbitration Rules 2023) provides that the arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided that such person is a party to the arbitration agreement. This is unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

This marked a significant change to the AIAC Arbitration Rules. There was previously no requirement for a person to be a party to the arbitration agreement in order to be joined in an arbitration. Rather, Rule 21 of the former AIAC Rules 2021 provided that the joinder of non-parties to an arbitration is permitted in circumstances, inter alia, where all parties to the arbitration and the additional party consent in writing to the joinder or where the participation of the additional party is necessary for the efficient resolution of the dispute and directly affects the outcome of arbitral proceedings.

27. What interim measures are available? Will local courts issue interim measures pending the constitution of the tribunal?

Pursuant to Section 19(1) of AA 2005, an arbitral tribunal is permitted to grant interim measures at the request of either party to the arbitration agreement. Section 19(2)(a) to (e) of AA 2005 confer power upon the arbitral tribunal to grant the following interim reliefs:

a. To order a party to maintain or restore the status quo pending determination of the dispute;
b. To take action that would prevent current or imminent harm or prejudice to the arbitral process itself, or to refrain from taking action that is likely to cause such harm or prejudice;
c. To provide a means of preserving assets out of which a subsequent award may be satisfied;
d. To preserve evidence that may be relevant and material to the resolution of the dispute; or
e. To provide security for the costs of the dispute.

An interim measure issued by an arbitral tribunal shall be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the court, irrespective of the country in which it was issued (see Section 19H of AA 2005).

The High Court has the power to issue interim relief before or during arbitration proceedings, irrespective of whether the seat of arbitration is in Malaysia.

Pursuant to Section 11 of AA 2005, the High Court may make the following orders:

a. To maintain or restore status quo pending the

determination of the dispute;
b. To take action that would prevent current or imminent harm or prejudice to the arbitral process, or to refrain from taking action that is likely to cause such harm or prejudice;
c. To provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of arrest of property or bail or other security, pursuant to the admiralty jurisdiction of the High Court;
d. To preserve evidence that may be relevant and material to the resolution of the dispute; or
e. To provide security for the costs of the dispute.

It should be noted that the powers of the court to grant interim relief are slightly wider than the powers of an arbitral tribunal. In considering an order to provide a means of preserving assets out of which a subsequent award may be satisfied, the High Court has the power to order an arrest of property or bail or other security, pursuant to the admiralty jurisdiction of the High Court.

28. Are anti-suit and/or anti-arbitration injunctions available and enforceable in your country?

Yes.

Generally, the court possesses the power to grant antisuit and/or anti-arbitration injunctions under Section 11 of AA 2005 and/or its inherent jurisdiction.

In respect of anti-suit injunctions, please see the case of Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316, where the Court of Appeal held that there is no doubt that a court has jurisdiction and power to grant an anti-suit injunction whenever the interest of justice calls for or demands it.

In respect of anti-arbitration injunctions, please see the following cases: —

a. Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors [2019] 5 MLJ 1, where the Federal Court allowed an anti-arbitration injunction sought by a non-party to an arbitration agreement. In reaching this decision, the Federal Court made a distinction between the test for the grant of an anti-arbitration injunction in an application:-
    - brought by the parties to an arbitration agreement (the higher threshold test as expounded in J Jarvis and Sons Ltd v Blue Circle Dartford Estates Ltd [2007] EWHC 1262 (TCC) i.e. that the injunction must not cause injustice to the claimant in the arbitration; the continuance of arbitration must be oppressive, vexatious, unconscionable and an abuse of process); and
    - by non-parties to an arbitration agreement (a lower threshold test as expounded in Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 i.e. whether there are serious issues to be tried, where the balance of convenience lies, and whether damages are an adequate remedy);
b. Federal Land Development Authority & Anor v Tan Sri Hj Mohd Isa bin Dato' Hj Abdul Samad & Ors [2021] 8 MLJ 214, where the High Court allowed an anti-arbitration injunction sought by a non-party to an arbitration agreement, restraining one of the Defendants (Synergy Promenade Sdn Bhd (SPSB)) from taking any or further step to continue with the arbitration proceedings in AIAC. In this respect, the High Court granted the anti-arbitration injunction on the application brought by Federal Land Development Authority (FELDA) because the test for the grant of such injunction was of a lower threshold for non-parties to the arbitration agreement than that for parties to the arbitration agreement. FELDA was a non-party to the arbitration agreement and was able to satisfy the lower threshold test;
c. Cockett Marine Oil (Asia) Pte Ltd v MISC Bhd & Another Appeal [2023] 1 CLJ 20, where the Court of Appeal set aside the High Court's decision to allow an anti-arbitration injunction to restrain the Appellant, from taking further steps in an arbitration proceeding due to a purported absence of an arbitration agreement. The Court of Appeal, in setting aside the decision, held that as there are no serious issues to be tried, there would be no basis for an anti-arbitration injunction;
d. Government of Malaysia v Nurhima Kiram Fornan & Ors [2020] MLJU 425, where the High Court allowed an anti-arbitration injunction to restrain the Defendants in this suit from taking further steps in an ad hoc arbitration proceeding commenced in Spain arising out of a Grant by the Sultan of Sulu of Territories and Lands on the mainland of the Island of Borneo in 1878 ("Deed of Cession"). The court granted the anti-arbitration injunction as there was no valid and enforceable arbitration agreement established in the Deed of Cession. Further, the anti-arbitration injunction was also granted as the Plaintiff, the Sovereign State of Malaysia, has immunity from judicial and arbitration proceedings and as such, cannot be forced to submit jurisdiction to the sole arbitrator; and
e. Lysaght Corrugated Pipe Sdn Bhd & Anor v Popeye

Resources Sdn Bhd & Anor [2022] MLJU 165; [2022] 1 LNS 191, where the High Court allowed the Plaintiff's application for an injunction to restrain arbitration proceedings in the Hong Kong International Arbitration Centre between the 2nd Defendant and the Plaintiffs due to alleged forged documents containing the arbitration agreements. The High Court granted the injunction after having considered both higher threshold and lower threshold tests.

29. Are there particular rules governing evidentiary matters in arbitration? Will the local courts in your jurisdiction play any role in the obtaining of evidence? Can local courts compel witnesses to participate in arbitration proceedings?

In arbitration, the parties are free to agree on the procedure to be followed by the arbitral tribunal, including the approach to the collection and submission of evidence. In the submission of the statement of claim and the defence, the parties are free to submit with their statements any document that they consider to be relevant, or to add a reference to the documents or other evidence that they may submit. One of the examples of such procedural rules include the International Bar Association (IBA) Rules on Taking Evidence in International Arbitration.

Unless otherwise agreed by the parties, the arbitral tribunal retains the power to decide whether to hold oral hearings for the presentation of evidence or oral arguments, or to conduct the proceedings on the basis of documents and other materials. However, if there is an application to hold oral hearings at an appropriate stage of the proceedings, it is mandatory for the arbitral tribunal to do so.

The rules of evidence that apply to arbitral proceedings seated in Malaysia would depend on the applicable rules of evidence agreed between the parties. Where the parties fail to agree on the applicable rules of evidence, the arbitral tribunal may determine the rules of evidence regarding admissibility, relevance, materiality and weight in such manner as it considers appropriate.

In respect of the application of the rules of evidence in court, it is statutorily stipulated that the Evidence Act 1950 does not apply to proceedings before an arbitrator.

With the approval of the arbitral tribunal, the parties are empowered to make an application under Section 29(2) of AA 2005 to the High Court for assistance in taking evidence. The High Court has the power to order the attendance of a witness to give evidence or, where applicable, to produce documents on oath or before an officer of the High Court or any other person, including the arbitral tribunal.

Pursuant to Article 27 of the UNCITRAL Arbitration Rules (Under Part II of the AIAC Arbitration Rules 2023), the arbitral tribunal may 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 thereof to the arbitral tribunal and the other parties.

30. What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your country?

It is implicit in AA 2005 that an arbitrator must be impartial; the requirement to disclose any circumstances that are likely to give rise to justifiable doubts regarding that person's impartiality or independence makes this clear. Good faith requirements are also mandated by AA 2005. Arbitrations pursuant to the Asian International Arbitration Centre are bound by the Asian International Arbitration Centre's Code of Conduct for Arbitrators, which references the International Bar Association Guidelines on Conflict of Interest in International Arbitration.

Advocates and solicitors in Malaysia who act as counsel in arbitration proceedings remain bound by the ethical codes and professional standards governing advocates and solicitors contained in the Legal Profession Act 1976.

31. In your country, are there any rules with respect to the confidentiality of arbitration proceedings?

Section 41A of AA 2005 provides that no party may publish, disclose or communicate any information relating to the arbitral proceedings under the arbitration agreement or an award made in those arbitral proceedings. This would include all pleadings, evidence, documents and the award, which will remain confidential and cannot be disclosed in subsequent proceedings.

There are three exceptions to this rule:

Where the publication, disclosure or communication is made to protect or pursue a legal right or interest of the party, or to enforce or challenge the award in legal proceedings before a court or other judicial authority;

If the publication, disclosure or communication is made to any government body, regulatory body, court or tribunal and the party is obliged by law to make the publication, disclosure or communication; or

If the publication, disclosure or communication is made to a professional or any other adviser of any of the parties.

The confidentiality obligation under Section 41A of AA 2005 does not, however, extend to non-parties of an arbitration proceeding (see Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd [2019] 10 MLJ 693).

The exceptions under the AIAC Arbitration Rules 2023 are where disclosure is necessary for the implementation and enforcement of the award or to the extent that disclosure may be required of a party by a legal duty, or to protect or pursue a legal right, or to challenge an award in bona fide legal proceedings before a court or other judicial authority. Unlike the AA 2005, the exceptions pursuant to the AIAC Arbitration Rules 2023 do not extend to a professional or any other adviser of any of the parties. The AIAC Arbitration Rules 2023 extend confidentiality further, with the same applying equally to the Arbitral Tribunal, the Director, the AIAC, any tribunal secretary and any witness or expert appointed by the Arbitral Tribunal, and parties are required to seek an undertaking of confidentiality from those involved in the arbitration.

32. How are the costs of arbitration proceedings estimated and allocated? Can pre- and post-award interest be included on the principal claim and costs incurred?

The costs of arbitration proceedings can be estimated with reference to the relevant arbitration rules adopted by the parties. For example, Rule 18 of the AIAC Arbitration Rules 2023 provides that the Director shall fix the fees of the Arbitral Tribunal and the AIAC Administrative Fee in accordance with Schedule 1(A) for international arbitrations (USD scale) and Schedule 1(B) for domestic arbitrations (RM scale). The calculation of fees shall be based on the amount in dispute comprising of the value of any claims, counterclaims, and any defence of set-off. Where claims and/or counterclaims are unquantified, the Director shall ascertain the amount in dispute, in consultation with the Arbitral Tribunal and the Parties, for the purpose of the deposit calculation.

Parties are entitled to recover such costs in an arbitration, especially where doing so is provided for in the arbitration agreement. The general principle in Malaysia in relation to the award of costs is for the arbitral tribunal to order costs in favour of the successful party and to award all reasonable costs incurred by that party during the arbitration. This would generally include legal fees and disbursements reasonably incurred by the party in respect of the arbitration.

33. What legal requirements are there in your country for the recognition and enforcement of an award? Is there a requirement that the award be reasoned, i.e. substantiated and motivated?

The only legal requirement for the enforcement of an arbitral award is the production of a duly authenticated original award or a duly certified copy of the award, and the original arbitration agreement or a duly certified copy of the agreement. As long as this formal requirement is complied with, the court must grant recognition and enforcement of an arbitration award upon such an application being made (see the Court of Appeal's decision in Tune Talk Sdn Bhd v Padda Gurtaj Singh [2020] 3 MLJ 184).

The legal requirements relating to the form, content and publication of an arbitral award are set out under Section 33 of AA 2005. In this respect, the arbitral award must be made in writing, signed by the arbitrator or a majority of all the members of the arbitral tribunal, state its date and seat of arbitration and, unless the parties have agreed otherwise or it is an award pursuant to a settlement, the award must also state the reasons upon which it is based.

However, the recognition and enforcement of an arbitral award may be refused based on the grounds listed under Section 39(1) of AA 2005. This will be further elaborated below.

In any event, pursuant to Clause 9 of the Arbitration Bill, Section 38(1) of the AA 2005 will be replaced and provide that an arbitral award delivered in an arbitration where the seat of arbitration is in Malaysia or a ���foreign State' is binding instantly or automatically, without the need for an enforcement application. In contrast, the existing Section 38(1) requires an application to be made to the High Court to recognise an award as binding and be enforced by entry as a judgement. This shift brings Section 38(1) of the AA 2005 closer to Article 35(1) of the UNCITRAL Model Law, as it provides the much-needed realignment in the spirit of alternative dispute resolution and concept of arbitrations.

Before the introduction of Clause 9 of the Arbitration Bill, a claimant seeking to enforce an arbitral award under Malaysian law, such as through garnishee proceedings or

attachment and seizure, would first need to have the award recognized and enforced as a High Court judgment. For instance, a debt or bank account cannot be garnished without a court judgment.

Clause 9 of the Arbitration Bill aims to eliminate the additional step of obtaining recognition of the award as a judgment. However, this raises practical concerns regarding the enforcement process and highlights a gap in how the Rules of Court 2012 ("**ROC 2012**") would apply for direct enforcement without a judgment. To facilitate this, amendments to Order 69 of ROC 2012 are necessary. The current Order 69 Rule 8(7) requires service of a court order granting permission to enforce the award and imposes a 14-day moratorium before the award can be enforced as a judgment in the Malaysian courts.

34. What is the estimated timeframe for the recognition and enforcement of an award? May a party bring a motion for the recognition and enforcement of an award on an ex parte basis?

Generally, enforcement proceedings in the court can take about two to three months where there is no challenge to the arbitral award. If the enforcement proceedings are opposed, the proceedings can take up anywhere between six to nine months. There is no specific expedited procedure for enforcement proceedings under AA 2005. However, the enforcement proceedings may be filed together with a certificate of urgency, of which an early hearing date may be fixed by the Court provided that the Court is satisfied of the applicant's explanation for the urgency of such proceedings to be fixed as soon as possible.

Based on the Rules of Court 2012, an application for recognition and enforcement of an arbitral award is allowed to be made ex parte. Subsequently, the respondent may apply to set aside the ex parte order within fourteen days. The award shall not be enforced until the expiration of the fourteen-day period, or if the respondent applies within the period to set aside, until after the application made by the respondent has been finally disposed of.

The Federal Court in CTI Groups Inc v International Bulk Carriers SPA [2017] 9 CLJ 499 dealt with the matter of recognition and enforcement of an ICC arbitral award awarded against the Defendant. The Court allowed the enforcement and recognition of the award and further described the enforcement proceeding as a two-stage process by reading ss. 38 and 39 of the AA 2005 with O.69 rr. 8 and 9 of the Rules of Court 2012. The first stage is an ex parte proceeding where the Court shall give an ex parte order to allow the Applicant to enforce an arbitral award against the Defendant. The second stage is an inter partes proceeding where the Court deals with the application to set aside an ex parte order giving leave to enforce an arbitral award, if any. Any application to set aside an ex parte order must be made within fourteen days after the order is served.

35. Does the arbitration law of your country provide a different standard of review for recognition and enforcement of a foreign award compared with a domestic award?

Malaysian law does not provide for a different standard of review for recognition and enforcement of a foreign award compared with a domestic award. However, it should be noted that for an award from a 'foreign State' to be recognized as binding and enforced, sections 38(1) and (4) of AA 2005 require the foreign State to be a party to the New York Convention.

Malaysia adopted the New York Convention in 1985. This Convention facilitates the recognition and enforcement of arbitration awards from other contracting states, making it easier to enforce foreign arbitration awards in Malaysia. Most countries with significant trade and investment relationships with Malaysia are also parties to the New York Convention.

36. Does the law impose limits on the available remedies? Are some remedies not enforceable by the local courts?

The types of remedies that an arbitral tribunal may award are not limited by the AA or the AIAC Rules. However, the type of remedies awarded are necessarily confined to the powers conferred on the arbitral tribunal by the parties in the agreement to arbitrate. Reliefs that form part of the exclusive jurisdiction of the court pursuant to statute may not be granted by an arbitral tribunal, even if the arbitral tribunal may decide on the subject matter of the dispute (see the UK Court of Appeal decision in Fulham Football Club (1987) Ltd v Richards and another [2011] EWCA Civ 855). In Malaysia, the case of Fulham Football Club (1987) Ltd v Richards and another [2011] EWCA Civ 855 was referred to in the Malaysian courts in the Federal Court case of Arch Reinsurance Ltd v. Akay Holdings Sdn Bhd [2019] 5 MLJ 186.

There is no limit to post-enforcement remedies once the arbitral award has been enforced. Section 38(1) of AA 2005 provides that an arbitral award shall be enforced by entry as a judgment of the Court. Hence, once the award

has been entered as a judgment, it may be executed like any other judgment of the courts in Malaysia e.g. garnishee proceedings, winding-up, bankruptcy etc.

It should be noted that an application to enforce an arbitral award must be made within six (6) years of the award being received and the judgment entered in terms of the award may then be executed within twelve (12) years (see Christopher Martin Boyd v. Deb Brata Das Gupta [2014] 9 CLJ 887 (Federal Court)).

However, as mentioned above, pursuant to the new Section 38(1) substituted by the 2024 Act, an award whose seat of arbitration is in Malaysia or from a foreign State shall be automatically recognized as binding without the need for an application to recognize the award, in line with the UNCITRAL Model Law. In any event, the aforementioned practical concerns regarding the enforcement process would need to be addressed for direct enforcement without a judgement.

37. Can arbitration awards be appealed or challenged in local courts? What are the grounds and procedure?

An arbitral award made by an arbitral tribunal pursuant to an arbitration agreement is final, binding and conclusive, and is not appealable based on questions of fact or law. This is because the arbitrator is master of the facts, and the courts should not review the arbitral award on its merits (see the Court of Appeal decision in Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd and another appeal [2018] 4 MLJ 799).

The limited circumstances in which an arbitral award may be set aside, or its recognition and enforcement may be opposed, are on the following grounds:-

a. A party to the arbitration agreement was under any incapacity;
b. 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;
c. The party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings, or was otherwise unable to present their case;
d. The award deals with a dispute that is not contemplated by or does not fall within the terms of the submission to arbitration;
e. The award contains decisions on matters that are beyond the scope of the submission to arbitration;
f. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
g. The subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or
h. The award is in conflict with the public policy of Malaysia.

(See sections 37 and 39 of AA 2005)

The case of Ken Grouting Sdn Bhd v RKT Nusantara Sdn Bhd and another [2021] 4 MLJ 622 illustrates an instance where an arbitral award was set aside by the court. This case was an appeal to the Court of Appeal against the High Court's decision to set aside an arbitral award under section 37(1)(a)(vi) of the AA 2005 (i.e. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties). The Court of Appeal dismissed the appeal. The Court of Appeal affirmed the High Court's finding that the arbitrator's failure to deliver the arbitral award by the deadline stipulated in the rules of arbitration resulted in the cessation of the arbitrator's mandate and/or jurisdiction. The Court of Appeal highlighted at [128] that once the mandate ceases, then the jurisdiction also ceased.

Further, in the case of Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd [2020] 12 MLJ 198, the Federal Court at [53] outlined the guiding principles on the exercise of residual discretion when an application for setting aside an award is grounded on breach of natural justice and therefore is in conflict with the public policy of Malaysia. The principles are: —

a. First, the court must consider which rule of natural justice was breached, how it was breached, and in what way the breach was connected to the making of the award;
b. Second, the court must consider the seriousness of the breach (that is, whether the breach was material to the outcome of the arbitral proceeding;
c. Third, if the breach is relatively immaterial or was not likely to have affected the outcome, discretion will be refused;
d. Fourth, even if the court finds that there is a serious breach, if the fact of the breach would not have any real impact on the result and that the arbitral tribunal would not have reached a different conclusion, the court can refuse to set aside the award;
e. Fifth, where the breach is significant and might have affected the outcome, the award can be set aside;
f. Sixth, in some instances, the significance of the breach may be so great that the setting aside of the award is practically automatic, regardless of the effect on the outcome of the award;
g. Seventh, the court has wide discretion dependent on

the nature of the breach and its impact. Therefore, the materiality of the breach and the possible effect on the outcome are relevant factors for consideration by the court; and

h. Eighth, while materiality and causative factors must be established, prejudice is not a prerequisite or requirement to set aside an award for breach of the rules of natural justice.

The above guiding principles are in line with the Federal Court's judgment in the case of Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal [2021] 1 MLJ 1.

Further, the recognition and enforcement of the arbitration award may be refused where 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 (see Section 39 of AA 2005 and Malaysian Bio-XCell Sdn Bhd v. Lebas Technologies Sdn Bhd & Another Appeal [2020] 3 CLJ 534 (Court of Appeal)).

Generally, parties intending to set aside an arbitral award or oppose recognition and enforcement of an arbitral award, shall make an application by way of originating summons to the High Court.

38. Can the parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitration clause)?

There is no right to appeal to an arbitral award. As stated above, an arbitral award however may be set aside, or its recognition and enforcement may be opposed.

However, parties may in fact waive the right to set aside an arbitral award. This relates to section 7 of the AA 2005 which provides for the waiver of the right to object. It provides that, inter alia, a party who knows that any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating its objection without undue delay, the party shall be deemed to have waived its right to object.

Section 7 of the AA 2005 was discussed in the case of Ketua Setiausaha Kementerian Dalam Negeri & Anor v Salconmas Sdn Bhd [2022] 6 MLJ 836. In this case, the Court of Appeal affirmed the High Court's finding that the appellants had effectively waived their right to set aside the award when they failed to raise any objection before the arbitrator (i.e. that the composition of the arbitral tribunal was not in accordance with the agreement of the parties).

39. In what instances can third parties or non-signatories be bound by an award? To what extent might a third party challenge the recognition of an award?

Generally, an arbitral award pursuant to an arbitration agreement is only binding on the parties to the arbitration agreement. Further, the AA 2005 does not confer the right to a third party to challenge the recognition of an arbitral award.

40. Have there been any recent court decisions in your jurisdiction considering third party funding in connection with arbitration proceedings?

There have not been any recent court decisions in Malaysia considering third party funding in connection with arbitration proceedings. The last reported court case in Malaysia concerning third party funding in connection with arbitration proceedings is Measat Broadcast Network Systems Sdn Bhd v AV Asia Sdn Bhd [2014] 3 CLJ 915, where the High Court took into consideration the fact that the defendant is reliant on third party funding in granting the application for security for costs as an interim measure pending arbitration proceedings.

The AIAC introduced a new rule via the AIAC Arbitration Rules 2023 which specifically deals with third-party funding. Rule 12 of the AIAC Arbitration Rules 2023 provides the obligation for a party that is funded by a third party in relation to the proceedings and/or its outcome to disclose the existence of the funding and the identity of the funder. This is a recent development in the AIAC Arbitration Rules in relation to third-party funding given that no such active disclosure was expressly required under the former AIAC Arbitration Rules 2021.

As mentioned above, under new provisions, i.e. Section 46A-I that provides a comprehensive framework for regulating third-party funding in Malaysia. The 2024 Act will provide that the common law rule against maintenance and champerty shall cease to apply meaning that future third-party funding agreements shall not be treated as being contrary to public policy on the grounds of maintenance and champerty.

Where the funded party has made a third-party funding agreement, the funded party shall disclose or communicate to the other party to the other party to the arbitration and the arbitral tribunal or the court before which proceedings are brought in respect of the arbitration, as the case may be, the fact that a third party funding agreement has been made and the name of the

third party funder in the third party funding agreement. The disclosure or communication shall be made where the third party funding agreement is made on or before the commencement of the arbitration or court proceedings in respect of the arbitration, upon the commencement of the arbitration or court proceedings or where the third party funding agreement is made after the commencement of the arbitration or court proceedings in respect of the arbitration, within fifteen days after the third-party funding agreement is made (Section 46G of the Arbitration Bill).

To regulate third party funding, the Minister may issue, revoke, vary, revise or amend a code of practice setting out the practices and standards parties and third party funders are expected to comply (Section 46D of the Arbitration Bill).

41. Is emergency arbitrator relief available in your country? Are decisions made by emergency arbitrators readily enforceable?

Emergency arbitrator relief is available in Malaysia. The AA 2005 expressly recognises the use of emergency arbitrators — the definition of "arbitral tribunal" in section 2 of the AA 2005 includes an emergency arbitrator.

In the recent case of CRCC Malaysia Bhd v DSG Projects Malaysia Sdn Bhd [2023] 9 MLJ 713, the High Court acknowledged at [29] that prior to the amendments of the AA 2005 in 2018 ("**2018 Amendments**"), interim measures issued by emergency arbitrators were not subject to recognition and enforcement. In fact, 'emergency arbitrators' were not even mentioned in the AA 2005 then. However, the current AA 2005 which incorporated the 2018 Amendments now prescribes emergency arbitrators with the same powers as any arbitrator under the AA 2005.

This means that the decisions of emergency arbitrators are recognised as binding and are readily enforceable in accordance with the provisions of the AA 2005, as if made by any other arbitrator.

42. Are there arbitral laws or arbitration institutional rules in your country providing for simplified or expedited procedures for claims under a certain value? Are they often used?

The AIAC Arbitration Rules 2023 provides for an expedited procedure under what is known as the AIAC Fast Track Procedure under Schedule 4. The Fast Track procedure can be adopted as long as one of the two criteria is fulfilled: —

(a) The parties have agreed in writing, by an arbitration agreement or otherwise, to arbitrate their dispute or refer their dispute to arbitration under the AIAC Fast Track Procedure; or

(b) The amount in dispute is quantified at less than USD300,000.00 for an international arbitration or less than RM1,000,000.00 for a domestic arbitration. Prior to the AIAC Arbitration Rules 2023, the minimum amount in dispute was higher, that is, USD500,000 for an international arbitration or less than RM2,000,000 for a domestic arbitration under the AIAC Arbitration Rules 2021.

Nevertheless, this expedited procedure is not often used in Malaysia. Based on the AIAC Annual Reports, in 2018, only one case used the AIAC Fast Track Arbitration Rules 2018 out of 66 administered arbitrations. In 2019, 3 cases used the AIAC Fast Track Arbitration Rules 2018 out of 98 administered arbitrations; in 2020, 3 cases used the AIAC Fast Track Arbitration Rules 2018 out of 69 administered arbitrations; and similarly in 2021, 3 cases used the AIAC Fast Track Arbitration Rules 2018 out of 88 administered arbitrations.

43. Is diversity in the choice of arbitrators and counsel (e.g. gender, age, origin) actively promoted in your country? If so, how?

Promotion of diversity in the choice of arbitrators and counsel have recently started gaining traction in Malaysia.

The AIAC has been active in promoting diversity in gender, age, race and ethnicity in respect of arbitrators in recent years. For instance, the AIAC hosted "Diversity in Arbitration Weeks" in both the years 2020 and 2021, where the AIAC hosted webinars each day on topics relating to diversity in arbitration during the week.

In respect of diversity in respect of counsels, the Kuala Lumpur Bar had in 2020 set up a Gender Equality and Diversity Committee to lead the development, implementation and initiatives designed to support a non-discriminatory workplace culture at the Bar, identify and seek to address barriers and unconscious biases faced by members based on gender which may hamper equality of opportunity and educate members on best equality and diversity practices.

According to the AIAC Annual Report in 2022, 34 (constituting 37.35%) out of 91 appointments of

arbitrators were female. This marks a significant milestone for AIAC as compared to the appointment of female arbitrators in 2021, which only constituted 14.5% of the total appointment and confirmation. The AIAC is continuously working in embracing gender diversity as a goal in its empanelment programme.

44. Have there been any recent court decisions in your country considering the setting aside of an award that has been enforced in another jurisdiction or vice versa?

There have not been any recent court decisions in Malaysia considering the setting aside of an award that has been enforced in another jurisdiction, nor have there been any recent court decisions in Malaysia considering the enforcement of an award that has been set aside in another jurisdiction.

45. Have there been any recent court decisions in your country considering the issue of corruption? What standard do local courts apply for proving of corruption? Which party bears the burden of proving corruption?

There have not been any recent Malaysian court decisions relating to corruption in the context of appointed arbitrators. The last Malaysian court decision dealing with this issue is the High Court case of MMC Engineering Group Bhd & Anor v Wayss & Freytag (M) Sdn Bhd & Anor [2015] MLJU 477, where the plaintiffs applied to set aside an arbitral award on the ground that the 2nd defendant, who was part of the arbitral tribunal had not disclosed the fact that he was charged with an offence of soliciting a bribe in another arbitration. The High Court held whilst no court would hesitate to set aside an award that has been made in instances of bribery or corruption, such corruption must have induced or affected the making of the award. The High Court dismissed the plaintiff's application and found that the plaintiff has failed to demonstrate the same other than the fact that the 2nd defendant was a person of possibly bad character and unfit to sit as arbitrator.

Section 37 of the AA 2005 and Section 39 of the AA 2005 provides that one of the grounds to set aside an award and refuse recognition of an arbitration award respectively, is for the High Court to find that the award is in conflict with the public policy of Malaysia, with one of the examples being where the making of the arbitral award is induced or affected by fraud or corruption. Therefore, the burden would ordinarily lie on the party applying to set aside the award or resisting enforcement of the award to prove corruption.

46. What measures, if any, have arbitral institutions in your country taken in response to the COVID-19 pandemic?

During the period of the COVID-19 pandemic in Malaysia, arbitral institutions have successfully held virtual hearings with the witnesses testifying from a neutral venue, for instance, at the AIAC, or elsewhere to prevent the risk of transmission.

For in-person hearings, in accordance with the requirement of social distancing dictated by Malaysia's Ministry of Health, the attendees at an in-person hearing are closely monitored to ensure the minimum distance is maintained.

47. Have arbitral institutions in your country implemented reforms towards greater use of technology and a more cost-effective conduct of arbitrations? Have there been any recent developments regarding virtual hearings?

Through the AIAC Arbitration Rules 2021, the AIAC had incorporated developments regarding virtual hearings, which provide for, amongst others:

(a) Without affecting the seat of arbitration, the parties and the Arbitral Tribunal are at liberty to agree to have meetings, conferences, deliberations, and hearings take place in person or virtually at a place or venue other than the seat of arbitration.

(b) The Arbitral Tribunal may direct that any witness, including an expert witness, be examined virtually, or, after consulting with the parties, direct that the entire hearing be conducted virtually.

(c) The AIAC may, at the request of the Arbitral Tribunal or other party, make available or arrange for virtual hearing facilities in the conduct of arbitral proceedings as required.

The above are maintained in the recent AIAC Arbitration Rules 2023.

48. Have there been any recent developments in your jurisdiction with regard to disputes on climate change and/or human rights?

Thus far, there have not been any recent legal developments in Malaysia in respect of climate change whether in litigation or arbitration. In respect of statute, Malaysia has primarily relied on Environmental Quality Act 1974 which only provides for criminal liability and prosecution for those who have breached the same, but not civil liability / causes of action. However, there were talks from the Environment and Water Ministry about a new Climate Change Act in Malaysia which is still in the early stages of development in April 2021. In January 2022, the Minister of Environment and Water of Malaysia revealed in a parliamentary sitting that it has completed the legal framework for the country's Climate Change Act which includes, amongst others, the formation of a climate change committee. In February 2023, the Minister for Natural Resources, Environment and Climate Change announced that the development of the climate change Bill is expected to take two to three years. The Bill would include the formation of a climate change committee.

In respect of human rights, several high-profile litigation cases sparking debates pertaining to human rights have been recently decided by the courts of Malaysia, albeit not arising out of arbitration:

(a) In January 2021, the Malaysian Federal Court have ruled that a travel ban imposed by the Malaysian Immigration Department on an individual on claims that she had disparaged the government was unlawful.

(b) In February 2021, the Malaysian Federal Court held an online news portal in contempt for five comments posted by readers despite the same being removed minutes after being brought to the online news portal's attention based on Section 114A of the Evidence Act 1950 which creates a presumption that the host, administrator, or editor of the website on which content appears is liable for publishing that content. This has raised concerns regarding the chilling of freedom of speech in Malaysia.

(c) In September 2021, the Malaysian High Court ruled that children born overseas to Malaysian mothers with foreign spouses should be automatically conferred citizenship, after holding that Article 14(1)(b) together with the Second Schedule, Part II, Section 1(b) which provides that every person born outside Malaysia whose father is a citizen and was born in Malaysia is a Malaysian citizen, must be read in harmony with Article 8(2) of the Federal Constitution which prohibits gender-based discrimination. However, in August 2022, the Malaysian Court of Appeal overturned the High Court's ruling by a majority opinion and held that only children born overseas to Malaysian fathers married to foreign spouses are entitled to citizenship by operation of law. The Court of Appeal ruled that the word “father” in the Second Schedule, Part II of the Federal Constitution of Malaysia meant the biological father alone and the court was unwilling to consider anything beyond the literal text of the Federal Constitution.

The Malaysian Parliament is playing an active role in embracing human rights: —

(a) On April 11 2023, the Malaysian Senate passed two bills reforming death penalty sentencing upon the same being passed by the House of Representatives on April 3, 2023. The bills will be sent to the King for his signing, after which the bills will officially become law. These bills will abolish the mandatory death penalty for a range of serious offences, including murder, drug trafficking, murder, treason and terrorism. However, the bills retain the death sentence for drug trafficking under the Dangerous Drugs Act 1952,

(b) Additionally, the Malaysian Parliament is moving to remove the offence of attempt to commit suicide under the Penal Code. In May 2023, the Malaysian Senate was unanimous to pass the Penal Code (Amendment) (No.2) Bill 2023 which primarily seeks to remove the offence of attempt to commit suicide under the Penal Code. This involves the deletion of Section 309 of the Penal Code which initially provides for the punishment of imprisonment and/or fine for the commission of attempted suicide. Once this amendment is enforced, the act of attempted suicide will no longer constitute a criminal offence under the Penal Code.

This marks a historic milestone in Malaysia's mental health and legal landscape. It aims to encourage those suffering from mental health issues to seek help and, subsequently, to reduce related cases.

49. Do the courts in your jurisdiction consider international economic sanctions as part of their international public policy? Have there been any recent decisions in your country considering the impact of sanctions on international arbitration proceedings?

There have not been any relevant decisions in Malaysia which consider the impact of sanctions on international arbitration proceedings.

50. Has your country implemented any rules or regulations regarding the use of artificial intelligence, generative artificial intelligence or

large language models in the context of international arbitration?

As of now, Malaysia has yet to implement specific rules or regulations governing the use of artificial intelligence, generative artificial intelligence, or large language models in the context of international arbitration. The regulation of AI and big data in Malaysia is currently evolving and relies on existing statutes and industry codes of conduct, such as the law of torts, the Consumer Protection Act 1999, the Personal Data Protection Act 2010, the Sale of Goods Act 1957, and the Contracts Act 1950.

The Malaysian government is actively considering the need for comprehensive legislation to regulate AI and big data technologies. Among the initiatives include the development of an AI Governance Framework, the establishment of a cybersecurity policy, the formulation of an AI Code of Ethics, and collaboration with various industries to create privacy, security, and ethical standards.

The Cyber Security Act 2024, officially gazetted on 26 June 2024, marks a significant advancement in Malaysia's efforts to fortify its digital defenses. While not directly targeted at artificial intelligence ("AI") or international arbitration, this law is highly relevant to the broader AI context, especially regarding data security and privacy concerns in digital platforms. Given that international arbitration often involves cross-border disputes, the protection of data under this act aligns with global best practices in AI regulation, as many jurisdictions emphasize similar cybersecurity measures when implementing AI technologies in legal frameworks. Thus, while Malaysia has not specifically addressed AI in arbitration, the Cybersecurity Act creates an important foundation for securing AI-driven processes in the legal sector.

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