

International Comparative Legal Guides



Practical cross-border insights into international arbitration work

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Contributing Editors:

Steven Finizio & Charlie Caher
Wilmer Cutler Pickering Hale and Dorr LLP

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Gary Born, Chair, International Arbitration Practice Group & Charlie Caher, Partner
Wilmer Cutler Pickering Hale and Dorr LLP

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Based on the Arbitration Act 2005 (“the Act”), there is a requirement for an arbitration agreement to be in writing (section 9(3)), either as a clause or a stand-alone agreement (section 9(2)). It can be constituted by a reference to another document containing an arbitration clause (section 9(5)) – *Malaysian Newsprint Industries Sdn Bhd v Bechtel International Inc* [2008] 5 MLJ 254 and *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 7 CLJ 785. An arbitration agreement may also be constituted by an allegation in the statement of claim at the arbitral proceeding that is not denied by the responding party (section 9(4)(b)); and an arbitration agreement need not be signed – see *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 7 CLJ 18.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Basic terms may include the rules of arbitration, appointing authority and number of arbitrator(s), language of arbitration, seat of arbitration and governing law. However, the parties should avoid any element that could render it null and void, inoperative or incapable of being performed.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Arbitration agreements are commonly enforced by the courts by staying court actions to allow arbitrations to proceed. A stay under section 10(1) is mandatory so long as the application is made before any other steps in court. The court may impose any condition for the stay (section 10(2)). In *Blocklink (M) Sdn Bhd v Tenaga Nasional Berhad* [2021] 1 LNS 2305, which involved a multi-tier dispute resolution clause, the court imposed the condition that the parties comply with the clause on pre-arbitration negotiations/mediation/adjudication.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

Normally, arbitration proceedings are governed by the Act. There are, however, other statutes that govern specific arbitrations, e.g. Electricity Supply Act 1990 (section 36) for disputes over electricity supply.

Another route to arbitration is section 24A of the Courts of Judicature Act 1964, where the High Court may refer any court matter, other than a criminal proceeding, to an arbitrator if: (a) the parties consent; (b) the matter requires prolonged examination of documents or any scientific or local investigation which cannot conveniently be conducted by the court; or (c) the question consists of matters of account. Notably, under (b) and (c), parties’ consent is not required; and, unless set aside by the High Court, the resultant arbitral award would be equivalent to a court judgment.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The Act governs both domestic and international arbitrations. The difference is limited to the application of Part III of the Act on consolidation of arbitrations, court determination of point of law, confidentiality of arbitration, and procedural matters of a domestic arbitration. Part III is not applicable to an international arbitration unless parties opt in. Conversely, Part III is applicable to a domestic arbitration unless parties opt out.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Except Part III and Part IV, the Act is largely based on the UNCITRAL Model Law. Part III relates to domestic arbitrations, while Part IV addresses the liability of the arbitrator, the immunity of arbitral institutions and the situation of bankruptcy/insolvency.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Mandatory rules under the Act are equally applicable to international arbitrations. These rules in Parts I, II and IV of the Act provide for the requirements of an arbitration agreement, the appointment and challenge procedure, the rules on the jurisdiction and competence of the arbitral tribunal, the avenue for interim measures, the general principles on the conduct of arbitration, the making of awards, the recourse against awards, the enforcement of awards, and the immunity of arbitrators. However, parties are free to choose the rules of any arbitral institution.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is “arbitrable”?

It is provided in section 4 of the Act that all disputes are arbitrable, unless the arbitration agreement is contrary to public policy or the subject matter is not capable of settlement through arbitration under Malaysian laws. Further, section 24A of the Courts of Judicature Act 1964 suggests that all matters other than criminal proceedings are arbitrable. Based on case law, matters not arbitrable are:

- (i) criminal matters;
- (ii) judicial review matters;
- (iii) matters under statutory tribunals, e.g. the Industrial Court under the Industrial Relations Act 1967, the Labour Court under the Employment Act 1955 and the Malaysian Competition Appeal Tribunal under the Competition Act 2010;
- (iv) land charge matters under the National Land Code 1965 – see *Arch Reinsurance Ltd v Akay Holdings Sdn Bhd* [2019] 1 CLJ 305; and
- (v) insolvency or corporate disputes involving winding-up powers of the High Court – *PRPC Utilities and Facilities Sdn Bhd v PBJV Group Sdn Bhd* [2022] 2 CLJ 276 and *NFC Labuan Shipleasing Ltd v Semua Chemical Shipping Sdn Bhd* [2017] 1 LNS 943, though there are cases holding that the underlying dispute is arbitrable.

The courts generally consider whether the subject matter involves public interest.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Enabling provision in section 18 allows the arbitral tribunal to rule on its own jurisdiction, either as a preliminary question or in an award on the merits.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Recent cases show that except when a dispute involves an additional non-party, a stay of the court action under section 10 will be granted – *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1 and *Protasco Bhd v Tey Por Yee & another appeal* [2018] 5 CLJ 299.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal’s decision as to its own jurisdiction?

In cases where the arbitral tribunal has made a preliminary ruling that it has jurisdiction, an appeal to the High Court under section 18(8) may be lodged. Appeal is not available when the ruling is that the arbitral tribunal has no jurisdiction – *Ragawang Corporation Sdn Bhd v One Amerin Residence Sdn Bhd* [2020] 7 AMR 365. If the ruling is made in an award on the merits (and not as a preliminary ruling), the courts may address the issue at setting-aside proceedings. Further, the decision of the High Court on the appeal is final as there is no right of appeal to the Court of Appeal (section 18(9)). As regards the standard, the appeal is by way of re-hearing and not a review – see *Usabasama SPNB-LTAT Sdn Bhd v Abi Construction Sdn Bhd* [2016] 7 CLJ 275.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

The position of Malaysian law is that non-parties should not be bound by an arbitration agreement. The Act does not empower any joinder of non-parties.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The typical limitation period is six years, as prescribed by section 6 of the Limitation Act 1953. The periods prescribed by the Limitation Act 1953 and any other written law are applicable to arbitrations (section 30 of Limitation Act 1953). Limitation periods under the Limitation Act 1953 are procedural in nature – *Thameez Nisha Hasseem v Maybank Allied Bank Berhad* [2023] 4 MLJ 145.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Pending insolvency proceedings of any party will not have any effect on ongoing arbitration, except when an interim liquidator has been appointed for a corporate party. On the making of an insolvency order, ongoing arbitration may be halted:

- (a) In respect of personal insolvency, a bankrupt claimant will require the sanction of the Director General of Insolvency (“DGI”) under section 38(1)(a) of the Insolvency Act 1967 (“IA”) to proceed with the arbitration; and a claimant wishing to proceed against a bankrupt respondent will have to first obtain the leave of the High Court under section 8(1)(a) of IA. For commencement of an arbitration after a bankruptcy order, section 49(1) of the Act provides that an arbitration agreement shall be enforceable by or against the DGI (who administers the property of the bankrupt claimant/respondent) if the DGI adopts the arbitration agreement. Further, under section 61(f) of IA, the DGI is empowered to refer any dispute to arbitration. Where the DGI does not adopt the arbitration agreement, a claimant may apply to the High Court under section 49(2) of the Act to enforce the agreement for a reference to arbitration. At

the same time, leave of the High Court under section 8(1)(a) of IA to commence the arbitration is required

- (b) As for corporate insolvency, leave of the High Court under section 471 of the Companies Act 2016 is required to proceed with or commence an arbitration when a corporate respondent has been ordered to be wound up, or when an interim liquidator has been appointed. Subject to the liquidator's exercise of powers under Part I of the 12th Schedule of the Companies Act 2016, an insolvent company may proceed with or commence an arbitration.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Under section 30 of the Act, it is recognised that the substantive law is determined by the choice of the parties. In the absence of a choice, the arbitral tribunal shall apply the law to which the dispute is most closely connected to – see *Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic* [2017] 6 AMR 219.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The National Land Code on land rights applies to land disputes regardless of the law chosen by the parties, especially if the land is situated in Malaysia.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Domestic and international arbitrations sited in Malaysia and the resultant awards could be challenged on the basis that 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” (sections 37(1)(a)(ii) and 39(1)(a)(ii)). Therefore, formation, validity and legality of the arbitration agreements are governed by the laws chosen by the parties, or in default, Malaysia laws.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

Ordinarily, parties are free to agree on an appointment procedure (section 13(2)), the number of arbitrators (section 12(1)), and the qualification requirement and nationality of the arbitrators. Impartiality and independence are the only limiting requirements for the selection and appointment of arbitrators, and situations akin to that in *Jivraj v Hashwani* [2011] UKSC 40 on the legitimacy of a selection criterion based on religion have not been reported.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

The default procedure in section 13 is the normative process that would apply if the party-agreed procedure fails. Under section 13, the Director of Asian International Arbitration Centre (“AIAC”) would make the selection and appointment.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

The court may intervene in very limited circumstances under section 13(7) when both party-agreed procedure and the Director of AIAC fail to come to an appointment. Further, the parties must first exhaust the party-agreed procedure and the process at AIAC before an application to the court – *Ragawang Corporation Sdn Bhd v One Amerin Residence Sdn Bhd* [2020] 7 AMR 365. Court intervention is limited to the High Court as there is no right of appeal against the decision of the High Court on the appointment (section 13(9)).

Other than that, the court may intervene through the challenge procedure under section 15(3) on grounds of impartiality or independence, or that the arbitrator does not possess the agreed qualifications. There is also no right of appeal against the decision of the High Court on such a challenge (section 15(5)).

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

One who has yet to be appointed is legally required to disclose any circumstances likely to give rise to justifiable doubts as to impartiality or independence (section 14(1)). This disclosure obligation continues from the time of appointment and throughout arbitral proceedings (section 14(2)), and full and timeous disclosure is required – *Persatuan Kanak-Kanak Spatik Selangor & Wilayah Persekutuan v Low Koh Hwa @ Low Kok Hua (practicing as the sole certified architect for Low & Associates)* [2023] 1 MLJ 342.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Sections 20–29 of the Act set out the basic rules of procedure. Falling under Part II, these rules apply to all arbitral proceedings sited in Malaysia. Section 20 stipulates the equal treatment and fair and reasonable opportunity requirements.

Parties are free to agree on the procedure (section 21(1)). The common practice is to adopt the rules of arbitration of an arbitral institution like the AIAC and Persatuan Akitek Malaysia (“PAM”). In default of an agreement on rules, the arbitral tribunal may conduct the arbitration as it considers appropriate, including the application of rules of evidence and the arbitrator's own knowledge and expertise, and the procedure and time limits for various steps of the proceedings (section 21(2)).

The arbitral tribunal also has the powers to determine the seat and place of arbitration and the language if parties fail to agree on the same (sections 22 and 24). The other rules regulate the statement of claim and defence (section 25), the hearings (section 26), default of compliance or attendance (section 27), tribunal-appointed expert (section 28) and court-assisted evidence (section 29).

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

Section 23 stipulates the date of receipt by the respondent of a

written request for arbitration as the commencement of arbitration. After the request, it is for the parties to follow the agreed procedure for the appointment of arbitrator(s), failing which the procedure under section 13 could be activated. There are no other mandatory procedural steps.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

The Legal Profession Act 1976 and Legal Profession (Practice and Etiquette) Rules 1978 govern the conduct of counsel from West Malaysia. The East Malaysian states of Sabah and Sarawak each have the Advocates Ordinance 1953 and Advocates (Practice and Etiquette) Rules 1988. Common to all rules, a counsel who has acted for the arbitrator in advising him on points of law is prohibited from acting for any of the parties to the arbitration. These rules are only applicable to counsel admitted as an Advocate and Solicitor of the High Court in Malaysia or an Advocate of the High Court of Sabah and Sarawak.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

On the duties of an arbitrator, it is worth noting that:

- (a) Section 20 stipulates the fundamental duty to treat parties with equality and give a fair and reasonable opportunity to present their respective case.
- (b) Section 18(2) imposes a duty to always disclose without delay any circumstances likely to give rise to justifiable doubts as to impartiality or independence.
- (c) Section 33(3) imposes a duty to state the reasons of the decision in the arbitral award.

As regards powers, the Act confers upon an arbitrator with wide powers including making procedural orders, discovery orders and orders in relation to evidence, appointing an expert, and even terminating an arbitration found to be unnecessary or impossible.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

The Legal Profession Act 1976 governs the right of audience in the High Court in Malaysia (in West Malaysia) while the Advocates Ordinance 1953 of Sabah and the Advocates Ordinance 1953 of Sarawak govern the right of audience in the High Court of Sabah and Sarawak.

There are certain restrictions, however. Foreign counsel may appear in arbitrations sited in Malaysia, as the prohibition against an unauthorised person acting as an advocate and solicitor is not applicable to foreign counsel (section 36(2B) and section 37A of the Legal Profession Act 1976). Further, section 3A of the Act expressly provides that a party may be represented by any representative. This was introduced in 2018 to nullify the Federal Court decision in *Samsuri bin Babaruddin v Mohamed Azubari bin Matiasin* [2017] 2 MLJ 141 prohibiting the appearance of foreign counsel.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Section 47 of the Act provides the immunity. An arbitrator is protected for any act or omission in the discharge of his functions except for an act or omission in bad faith. Arbitrators are, however, not immune to criminal laws. In *Yusof Holmes bin Abdullah v PP* [2020] 10 MLJ 269, an arbitrator was convicted of cheating the Director of AIAC for having signed and made a false declaration in a Statement of Independence.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

The Act provides for court intervention only in the limited circumstances of interim measures and aiding the arbitration. The courts have no jurisdiction to deal with other procedural issues.

The High Court has the power to issue orders for interim measures (sections 11 and 19J), subpoena orders to compel attendance and the production of documents (section 29), and extension-of-time orders for making of an award (section 46).

Further, although subject to the consent of the arbitrator or the parties, the High Court may determine a preliminary point of law (section 41). The threshold is very high: there must be a pure question of law (see *Bauer (M) Sdn Bhd v Kukdong Engineering & Construction Co Ltd* [2017] 7 CLJ 414); and the consent of the arbitrator or the parties is required.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

An arbitral tribunal has wide powers to order interim measures: interim injunctions; security for costs; discovery of documents and interrogatories; and evidence taking (section 19 read with section 19A to section 19I, and section 21(3)). Such types of relief are not exhaustive, as section 21(3) provides for such order as the arbitral tribunal considers appropriate.

An arbitral tribunal is not required to seek court assistance to issue an interim measure award. An interim measure award shall be recognised as binding and may be enforced by the High Court (sections 19H and 19I). Court assistance is limited to enforcement of the interim measure (section 19I) and issuance of subpoena orders to compel attendance and production of documents (section 29).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

The High Court may only order interim relief of injunction and security for costs (sections 11 and 19J). The court is required to treat any finding of facts made by the arbitral tribunal as conclusive (sections 11(2) and 19J(3)). The court's powers are designed to facilitate the arbitral process and not to displace it – *Obnet Sdn Bhd v Telekom Malaysia Bhd* [2019] 8 CLJ 628.

The court does not have the power to issue a declaration over the arbitration or order a stay of any arbitral ruling – *Ragawang Corporation Sdn Bhd v One Amerin Residence Sdn Bhd* [2020] 7 AMR 365.

The circumstances in which interim relief may be sought from the High Court include:

- (a) during the period when the arbitral proceedings have not been commenced or when the arbitrator has not been appointed;
- (b) to assist international arbitration sited outside Malaysia; and
- (c) to preserve/restore *status quo*, assets and evidence.

A party's request to court will not have any effect on the jurisdiction of the arbitral tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The Malaysian courts commonly defer to the arbitral tribunals, and adopt the minimalist approach. A party may be required to explain the reason for not seeking interim measures before the arbitral tribunals. Court-ordered interim measures/reliefs under section 11 should only be invoked to “aid, support or facilitate” the arbitral proceedings – *Syarikat Ong Yoke Lin Sdn Bhd v Grand Dynamic Builders Sdn Bhd* [unreported High Court Judgment dated 2 July 2023].

Other considerations: interim relief should not involve third parties and must be relevant to the arbitration – *Damai City Sdn Bhd v MCC Overseas (M) Sdn Bhd* [2022] 9 CLJ 639; the courts do not decide on the merits of the dispute at arbitration; and the court's reasonings for interim relief are not binding on the arbitral tribunal – *KNM Process System Sdn Bhd v Cypark Sdn Bhd* [2020] 10 MLJ 321.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

The power of the court to issue an anti-suit injunction is held in sections 52(3)(e) and 54(a) of the Specific Relief Act 1950: prevention of multiplicity of proceedings. Anti-suit injunctions may be granted whenever interests of justice demand it – *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316.

Commonly, a stay under section 10 would be issued when a suit is commenced in breach of an arbitration clause. A stand-alone anti-suit injunction restraining a party from commencing or continuing with a suit (in Malaysia) in spite of an arbitration is rare. More likely is an anti-suit injunction to restrain a party from commencing or continuing with a foreign suit in breach of an arbitration clause. The considerations are: an injunction is required to protect the contractual right to arbitration; a suit would be vexatious or oppressive; and a suit would be an illegitimate interference with the arbitration.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Sections 11(1)(e) and 19J empower the High Court to order security for costs of the arbitration, while sections 19(2)(e), 19E and 21(3)(d) empower the arbitral tribunal to do the same.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Sections 19H and 19I provide for the recognition and

enforcement of interim measure by arbitral tribunal irrespective of the country in which the measure was issued. Under section 19I(1), the recognition or enforcement may be refused only if:

- (a) (i) a party was under any incapacity, (ii) the arbitration agreement is not valid, (iii) the party was not given notice of the appointment of the arbitrator or of the arbitral proceedings or was unable to present that party's case, (iv) the interim measure deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, (v) the interim measure contains decisions on matters beyond the scope of submission, or (vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- (b) the enforcing party had not complied with any provision of security in connection with the interim measure if ordered by the arbitral tribunal;
- (c) the interim measure itself has been terminated or suspended by the arbitral tribunal;
- (d) the interim measure is incompatible with the powers of the court but the court may reformulate the interim measure to adapt it while maintaining its substance;
- (e) the interim measure relates to a subject matter not capable of settlement by arbitration; or
- (f) the interim measure is in conflict with the public policy of Malaysia.

Generally, and as set out in (a), (c) and (f) above, interim measures are adopted in the enforcement of a final award.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Section 2 of the Evidence Act 1950 expressly excludes arbitration proceedings from its application. Therefore, a departure from the Evidence Act 1950 would not taint an award – *Jeuro Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd* [1998] 6 MLJ 545.

In the absence of a party-agreement on rules of evidence, the arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence (section 21(3)). It is common for parties to adopt the IBA Rules on the Taking of Evidence in International Arbitration or similar rules set by arbitral institutions, e.g. Article 14 of the PAM Arbitration Rules 2019 and Rule 27 of the AIAC Arbitration Rules 2021.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Section 19F of the Act empowers the arbitral tribunal to order disclosure/discovery in relation to proceedings for interim measures. In respect of the arbitral hearing of the dispute on the merits, the powers to order disclosure/discovery are usually derived from the agreed procedure, e.g. Article 14.3 of the PAM Arbitration Rules 2019 and Rule 27.3 of the AIAC Rules 2021. Where there is no agreement on procedure, the arbitral tribunal is deemed to have the powers to order disclosure/discovery (section 21(3)(e) and (f)).

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Section 29 empowers the High Court to issue subpoena orders to compel attendance and the production of documents to aid

and facilitate the arbitration. The considerations are: relevancy; and materiality – *Coneff Corporation Sdn Bhd v Vivocom Enterprise Sdn Bhd* [2019] MJJU 1666.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Under section 26(1), absent an agreement, the arbitral tribunal must decide on whether to conduct the arbitration by oral hearings or document-based proceedings. The tribunal also has the power to order that evidence be given on oath or affirmation (section 21(3)(h)). An arbitrator being the person having the authority to receive evidence (by consent of the parties) is authorised to administer oaths and affirmations (section 4 of the Oaths and Affirmations Act 1969).

On witness testimony, section 26(3) provides that all parties must be given reasonable prior notice of any hearing, and section 26(4) provides that all statements, documents or other information supplied to the arbitral tribunal by one party must be communicated to the other party.

It is common practice for testimony to be presented in a witness statement. It is also provided in arbitration rules, e.g. Article 16.3 of the PAM Arbitration Rules 2019: testimony may be presented in a written form, either as a signed statement or a sworn affidavit.

The Act does not expressly provide for the right of cross-examination. It is common practice that oral testimony will be subject to cross-examination. Arbitration rules may stipulate it as a right, e.g.: Article 15.1 of the PAM Arbitration Rules 2019, which suggests that a party has the right to be heard orally unless there has been a written agreement for document-based arbitration; and Article 16.4, which provides for oral questioning.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

The following are protected by privilege (sections 126, 127, 128 and 129 of the Evidence Act 1950):

- (a) all communications made to an advocate and his interpreters and clerks/servants “by or on behalf of” his client;
- (b) the contents or condition of any documents; and
- (c) all advice given to the client.

These rules apply to outside counsel engaged by the advocate – *PP v Dato’ Seri Anwar bin Ibrahim (No. 3)* [1999] 2 MJJ 1.

Communications between an advocate and in-house counsel may be privileged – see *Toralf Mueller v Alcim Holding Sdn Bhd* [2015] MJJU 779. In-house counsel may be considered, as the client cannot be compelled to disclose communications.

Privilege may only be waived by the client and is deemed to have been waived if the client calls the advocate as a witness to answer questions on privileged matters (section 128 of the Evidence Act 1950).

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contains reasons or that the arbitrators sign every page?

Section 33 of the Act requires an arbitral award to be in writing and signed by the arbitrator or majority of the arbitrators, state

its date and the seat of arbitration, and be delivered to each party. Under section 33(3), reasons must be stated in the award unless the parties had agreed otherwise or when it is a settlement award.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The arbitral tribunal has the power to correct any error in computation, any clerical or typographical error or other error of a similar nature on an application by a party, or on its own volition within 30 days of the award or its receipt (sections 35(1)(a) and 35(3)).

Under section 35(1)(b), a party may apply with the agreement of the other party for an interpretation by the arbitral tribunal of a specific point or part of the award within 30 days of the receipt of the award. On omission of claims, section 35(4) allows a party to apply for an additional award on those claims presented in the arbitral proceedings to be omitted from the award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

The Act does not provide for an appeal on the merits. The previous appeal process under section 42 of the Act was repealed in November 2018. The appeal process is only available in respect of a decision under section 15 on an impartiality/independence challenge, and a decision under section 18 on a positive preliminary ruling on jurisdiction. Further, it is a one-tier appeal to the High Court without a further right of appeal to the Court of Appeal.

For an arbitral award, the recourse available is setting aside under section 37. Setting aside is available for an award containing a decision on the substance of the dispute but not an interim ruling or preliminary order – *Ragawang Corporation Sdn Bhd v One Amerin Residence Sdn Bhd* [2020] 7 AMR 365.

The application to set aside must be made within 90 days from the date of the receipt of award, except for a case of a fraud/corruption-induced award, in which there is no time limit.

The grounds for setting aside are limited. Under section 37(1)(a), setting aside is ordered “only if”, and the burden lies with the applicant to show “proof” (connoting the higher threshold) that: (i) the party was under any incapacity; (ii) the arbitration agreement is not valid; (iii) the party was not given notice of the appointment of the arbitrator or of the arbitral proceedings, or was unable to present that party’s case; (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; (v) the award contains decisions on matters beyond the scope of submission; or (vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

Alternatively, under section 37(1)(b), setting aside is ordered “only if” the court finds that the dispute is not capable of settlement by arbitration under the laws of Malaysia or the award is in conflict with the public policy of Malaysia. The public policy limb includes situations of an award being brought about by fraud or corruption, or when a breach of the rules of natural justice had occurred. On natural justice, the breach must have a material impact on the outcome.

Further, section 37(3) allows the setting aside of parts of awards containing decisions on matters not submitted to arbitration.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

There is no case law on contracting out of the limited grounds for setting aside under section 37. Contracting out may not be possible for several reasons:

- (a) Pursuant to section 24 of the Contracts Act 1950, an agreement that defeats any law or is opposed to public policy is unlawful.
- (b) Under section 29 of the Contract Act 1950, any agreement that absolutely restricts a party from enforcing his rights in respect of any contract (i.e. the arbitration agreement) by way of the legal proceedings (i.e. relief under section 37) would be void – *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1.
- (c) Jurisdiction of the court “in arbitration related matters is never ousted, even by the presence of any clear agreement to arbitrate” – *CLS Power System Sdn Bhd v Sara Timur Sdn Bhd* [2015] 11 MLJ 485.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Such an agreement may be void as the Act does not provide for an appeal on the merits against an arbitral award, and consent does not confer jurisdiction.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

The Act does not provide for an appeal on the merits against an arbitral award.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Malaysia is a signatory of the New York Convention and has two reservations – a reciprocity reservation and a commercial reservation. The current relevant national legislation is the Act.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Malaysia is a signatory of the ASEAN Agreement for the Promotion and Protection of Investments (1987).

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Section 38 of the Act provides for the enforcement procedure. The enforcing party must produce an authenticated award and the arbitration agreement, or a certified copy thereof, in the national language of Malaysia or the English language. Order

69 Rule 8 of the Rules of Court 2012 sets out the procedural steps for enforcement.

The courts are inclined to enforce an arbitral award so long as the procedural steps are complied with – *CTI Group Inc v International Bulke Carriers SPA* [2017] 5 MLJ 314 and *Alami Vegetable Oil Products Sdn Bhd v Hafeez Iqbal Oil & Ghee Industries (PVT) Ltd* [2016] 12 MLJ 169.

Pursuant to section 39, enforcement may be refused only:

- (a) on proof that: (i) a party was under any incapacity; (ii) the arbitration agreement is not valid; (iii) the party was not given notice of the appointment of the arbitrator or of the arbitration proceedings, or was unable to present that party's case; (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; (v) the award contains decisions on matters beyond the scope of submission; (vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or (vii) the award has not yet become binding on the parties or has been set aside or suspended by a court; or
- (b) if the High Court finds that the dispute is not capable of settlement by arbitration under the laws of Malaysia or the award is in conflict with the public policy of Malaysia.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

An arbitral award is final and binding on the parties and may be used in any court proceedings (section 36). *Res judicata* applies and may arise from an award – *Tipco Asphalt Public Company Ltd & Anor v Aras Jalinan Sdn Bhd & Other Appeals* [2013] 8 CLJ 498.

On interim measures, sections 11(2) and 19J(3) provide that findings of fact made by the arbitral tribunal are to be treated by the court as conclusive when dealing with interim measures.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

A high threshold is required to be met, i.e. a strong case that the award conflicts with the public policy of Malaysia.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Section 41A of the Act imposes confidentiality. However, proceedings are not protected by confidentiality if the protection or pursuance of a legal right or the enforcement of, or challenge against, an award requires disclosure. Further, disclosure may be made to any government/regulatory body, court or tribunal to which the party is obliged by law to disclose.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Information may be disclosed to protect or pursue a legal right or to enforce or challenge an award.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

There are no limitations in the Act. Typically, administrative law remedies and statutory remedies, e.g. winding-up orders, are not available in arbitration.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Simple interest and/or compound interest are available, and the rate is determined by the arbitral tribunal as it considers appropriate (section 33(6)).

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Section 44 empowers the arbitral tribunal to award costs and expenses of an arbitration at its discretion. Indemnity is available, and the loser-pays principle applies.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

An award is not subject to tax directly. The Deduction for Loss of Cash and Treatment of Recoveries, Public Ruling No. 4/2012 (“PR 2012”) and the Tax Treatment of Wholly and Partly Irrecoverable Debts and Debt Recoveries, Public Ruling No. 4/2019 (“PR 2019”) issued by the Inland Revenue Board of Malaysia may be applicable. Under PR 2012, a loss of cash by theft, defalcation and embezzlement deducted in the computation of adjusted income when recovered is to be taken as gross income for taxation purposes. Further, under PR 2019, a bad debt written off and deducted in the computation of adjusted income if subsequently recovered is to be included in the gross income for the year when the amount is recovered. Hence, recovery under an arbitral award may have tax implications.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any “professional” funders active in the market, either for litigation or arbitration?

Claim funding in the form of champerty is not allowed in Malaysia – *Amal Bakti Sdn Bhd & Ors v Milan Auto (M) Sdn Bhd & Ors* [2009] 5 MLJ 95.

As for contingency fees, section 112(1) of the Legal Profession Act 1976 prohibits any agreement with a stipulation for “payment only in the event of success”. However, an agreement for payment of a fixed sum plus a success fee is valid – see *Chai Chee Chin and Others v Tetuan Zabari Ong & Co* [2006] 8 CLJ 84.

14 Investor-State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as “ICSID”)?

Malaysia is a signatory of the ICSID Convention, and has ratified the same by the Convention on the Settlement of Investment Disputes Act 1966.

14.2 How many Bilateral Investment Treaties (“BITs”) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Based on the statistics from the United Nations Conference on Trade and Development, Malaysia has entered into 71 bilateral investment treaties and 26 treaties with investment chapters. Malaysia is not a member party of the Energy Charter Treaty.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example, in relation to “most favoured nation” or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Noteworthy language like the “most favoured nation” has been adopted in some treaties to which Malaysia is a party, e.g. Article 3(2) of the Australia-Malaysia Bilateral Treaty Agreement and Article 6.1 of the ASEAN Comprehensive Investment Agreement. The intended significance of such noteworthy language is to allow for more favourable rights and the importation of substantive obligations in relation to investor-state arbitration.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Restrictive/functional immunity doctrines have been applied in Malaysia, and state immunity would not be granted for acts or transactions that are commercial in nature – *The United States of America v Menteri Sumber Manusia* [2022] 5 AMR 213.

Immunity is not available to protect an international organisation from a judicial review proceeding that challenges acts outside the scope of the functions stipulated in the host treaty – see *One Amerin Residence Sdn Bhd v Asian International Arbitration Centre* [unreported Court of Appeal Judgment dated 25 January 2022].

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the types of dispute commonly being referred to arbitration?

- (1) There is a proposal to reinstate the appeal process in the repealed section 42.

- (2) The Court of Appeal in *Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd* [2018] 3 MLJ 608 suggested amendments to section 37 to allow the courts to vary the award.
- (3) There have been cases involving awards of Malaysia Arbitral Tribunal Establishment (“MATE”) wherein the courts had questioned the conduct of arbitrations. The High Court in *Mohd Ali bin Amir Batcha v Kerajaan Malaysia & Others* [unreported judgment dated 21 September, 2022] held that “the manner in which the MATE has carried itself is seriously questionable” and that “MATE made startling awards”.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

In July 2020, the Bar Council Malaysia made a proposal for an appeal process where subject to prior leave of the High Court, an appeal on points of law against a domestic arbitral award may be brought.

15.3 What is the approach of the national courts in your jurisdiction towards the conduct of remote or virtual arbitration hearings as an effective substitute to in-person arbitration hearings? How (if at all) has that approach evolved since the onset of the COVID-19 pandemic?

In 2020, the Courts of Judicature Act 1964 was amended and Order 33A was introduced in the Rules of Court 2012 to provide for court proceedings to be conducted via remote communication technology. Online hearings have become the norm at all levels of the court system, and arbitral awards arising from online arbitrations have been accepted by the courts.



Teh Eng Lay graduated with his Law degree with Honours from the University of London in 1999, and went on to obtain his Certificate in Legal Practice from the Qualifying Board. He completed his pupillage with Cheah Teh & Su and commenced legal practice in August 2001 upon his admission as an Advocate and Solicitor of the High Court in Malaysia. He regularly appears before the High Court, the Court of Appeal and the Federal Court. In August 2007, he was made a Partner with Cheah Teh & Su. He handles a variety of arbitrations and litigation cases, involving matters on administrative and public law, development and planning law, land acquisition, land transactions and land-related disputes, contractual disputes, and corporate and commercial disputes.

Cheah Teh & Su

L-3-1, No. 2, Jalan Solaris, Solaris Mont' Kiara
50490 Kuala Lumpur, Wilayah Persekutuan
Malaysia

Tel: +603 6203 6918

Email: englay@ctslawyers.com.my

URL: www.ctslawyers.com.my



Poh Jonn Sen has been an associate with Cheah Teh & Su since November 2021. He read Law at the University of Leeds, where he graduated with Second-Class Honours (Upper Division). He then pursued the Bar Professional Training Course at the University of London, and was admitted to the Bar of England and Wales by the Honourable Society of the Middle Temple, London, before being admitted and enrolled as an Advocate and Solicitor of the High Court of Malaysia.

Prior to joining Cheah Teh & Su, he completed his pupillage at Cecil Abraham & Partners, where he was largely involved in the areas of general civil litigation and arbitration disputes, and where he had the opportunity to closely assist the firms' Partners for matters at the appellate courts and arbitral disputes largely administered by the AIAC.

In his current role, his current areas of practice are arbitration, civil litigation pertaining to matters on development and planning law, as well corporate and commercial litigation ranging from corporate disputes and shareholders disputes. As an associate at Cheah Teh & Su, he handles a wide array of active cases and has contributed to the firm in assisting with matters at the High Court, Court of Appeal and Federal Court.

He is also an active member of the Kuala Lumpur Bar and the Malaysian Bar, and represents the Kuala Lumpur Bar and Malaysian Bar's volleyball team for the annual games against other states and countries.

Cheah Teh & Su

L-3-1, No. 2, Jalan Solaris, Solaris Mont' Kiara
50490 Kuala Lumpur, Wilayah Persekutuan
Malaysia

Tel: +603 6203 6918

Email: jonnensen@ctslawyers.com.my

URL: www.ctslawyers.com.my



Andy Gan Kok Jin is a dynamic and dedicated legal professional specialising in dispute resolution. With a promising career trajectory and three years of practical experience, he is equipped with strong analytical skills, an ability to grasp complex legal concepts and has meticulous attention to detail and procedure in dispute resolution proceedings.

He obtained his Bachelor's degree in Law from the National University of Malaysia, where he developed a strong foundation in legal principles and critical thinking. He then started his legal career as a pupil at a leading corporate law firm, Albar & Partners. Upon completion of his pupillage, he was offered to join one of the leading dispute resolution law firms in Malaysia, Cheah Teh & Su to continue his practice.

As a junior lawyer, he embarked on his legal career at Cheah Teh & Su, where he quickly gained hands-on experience in various aspects of dispute resolution. He actively contributed to a wide range of cases, collaborating with senior colleagues to research legal issues, draft submissions, and assist in client consultations.

In addition to his practical experience, he is an avid learner and has actively sought opportunities to expand his knowledge in dispute resolution. He has attended specialised training programmes, workshops and seminars conducted by leading experts in the field. His commitment to professional development is evident in his continuous efforts to stay updated with the latest developments and trends in dispute resolution.

Passionate about contributing to the legal community, he has actively participated in various legal associations and organisations. He is a member of the Malaysian Bar Council and the active committee of the KL Bar Young Lawyers Committee, regularly attending events and networking opportunities to engage with fellow legal professionals. He believes in the power of collaboration and the exchange of ideas to enhance the practice of dispute resolution.

Cheah Teh & Su

L-3-1, No. 2, Jalan Solaris, Solaris Mont' Kiara
50490 Kuala Lumpur, Wilayah Persekutuan
Malaysia

Tel: +603 6203 6918

Email: andy@ctslawyers.com.my

URL: www.ctslawyers.com.my

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