Malaysian Arbitration (Amendment) (No 2) Act 2018: A Practical Commentary

by Crystal Wong Wai Chin

The Arbitration Act 2005 ("2005 Act") is the primary piece of legislation regulating Malaysian arbitration. The 2005 Act, principally based on the United Nations Commission on International Trade Law Model on International Commercial Arbitration ("UNCITRAL Model Law"), came into force on 15 March 2006. On 8 May 2018, the Arbitration (Amendment) (No 2) Act 2018[1] ("Amendment Act") came into force. The Amendment Act enhances interim protection measures and confidentiality while minimising recourse against arbitral awards.

The amendments represent a significant reform to Malaysian arbitration law. They are the product of a consistent and continuing effect towards the promotion of "... Malaysia's profile on international and regional arena as a safe-seat and arbitration friendly jurisdiction".[2] The amendments adopt the 2006 amendments to the UNCITRAL Model Law.

This commentary focuses on five key points of general interest to the arbitration industry.

Removal of writing requirement

This amendment removes the positive and evidentiary writing requirement and seeks to address advances in communication technology. An agreement to arbitrate may be entered into in any form (including orally) as long as the contents of the agreement are recorded. There is no longer any requirement for the signature of parties or an exchange of message between the parties.

However, parties should be mindful of the possibly more stringent requirement for an "agreement in writing" in Article II of the Convention of the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention 1958").

Interim measures

The 2018 amendments introduce a raft of supplementary provisions in relation to the granting of interim measures by both the arbitral tribunal and the Malaysian High Court. These newly introduced sections, i.e. 19A to 19J, mirror the provisions in the 2006 amendments to the UNCITRAL Model Law regarding interim measures. The additional provisions establish a regime in respect of requests for interim measures, and provide useful guidance on the operation, recognition and enforcement of interim orders.

New section	Explanatory note
19A	sets out the conditions for granting interim measures
19B	permits applications for preliminary orders and sets out the conditions for granting preliminary orders
19C	creates a specific regime and mechanism governing the granting of preliminary orders
19D	allows the arbitral tribunal to modify, suspend or terminate an interim measure that it has granted
19E	permits the arbitral tribunal to require security from the party requesting an interim measure.
19F	requires a party to promptly disclose any material change in the circumstances on the basis of which the interim measure was requested or granted
19G	provides that the requesting party shall be liable for any costs and damages caused by the interim measure if the arbitral tribunal later determines that the interim measure should not have been granted.
19H	provides for the recognition and enforcement of an interim measures issued by an arbitral tribunal
19I	sets out the grounds for refusing recognition or enforcement of an interim measure
19J	provides that the High Court has the power to issue interim measures in relation to arbitration proceedings, irrespective of whether the seat of arbitration is in Malaysia

1 [*Act A1569*]
2 Explanatory Statement to the Arbitration (Amendment) (No 2) Bill (2018)

Interest

Issues have recently arisen about the extent of an arbitral tribunal's jurisdiction to order non-contractual pre-award interest. The amended **section 33** expressly grants arbitral tribunals the power to award simple or compound interest both pre- and post-award.

Confidentiality

The attribute of confidentiality is seen by arbitration users to be an important element in international arbitration, especially where the dispute involves business trade, military secrets or intellectual property. However, various legal systems have failed to explicitly address the level of confidentiality. The amendments seek to impose a new regime of statutory confidentiality for arbitrations. Except where disclosure is required by law, these provisions are mandatory unless the parties agree otherwise.

In addition, pursuant to the newly enacted section 41B of the 2005 Act, all court proceedings should be heard in chambers unless otherwise ordered. The court may make an order to have the proceedings heard in open court upon the application by a party, or on its own motion if satisfied that the proceedings ought to be heard in open court.

Abolition of Sections 42 and 43 of Arbitration Act 2005

The Malaysian High Court may no longer review awards on questions of law arising out of an arbitration award. The amendment was prompted by the decision in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang*,[3] which expanded the scope for judicial supervision on domestic arbitral awards through challenges on questions of law. The Federal Court held that an arbitral award may be challenged in court on any question of law pursuant to section 42 of the 2005 Act, including those that have been specifically referred to an arbitrator, which were previously not challengeable.

With the deletion of this specific court supervisory power, a Malaysian arbitral award, whether domestic or international, can now only be challenged on the grounds set out in sections 37 and 39 of the 2005 Act, which are the grounds for challenge set out in the New York Convention and the UNCITRAL Model Law.

Conclusion

The reforms introduced by the Amendment Act, coupled with the recently updated 2018 Asian International Arbitration Centre Arbitration Rules, are likely to further enhance Malaysia's position as a major hub for dispute resolution in Asia and as an important centre for international arbitration. **LH-AG**

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3 [2018] 1 MLJ 1 (FC)