LH AG
ADVOCATES AND SOLICITORS

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Arbitration in Malaysia: The Way Forward

2021 IN THIS ISSUE

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FOREWORD

BY DATO' NITIN NADKARNI

On behalf of the International Arbitration Practice of Lee Hishammuddin Allen & Gledhill (LHAG), I am delighted to welcome you to our first International Arbitration newsletter of 2021, *Arbitration in Malaysia: The Way Forward*. Even as we hope for a better year in 2021, I believe we must not view 2020 as a lost year. Faced with the adversities of the pandemic Malaysian heroes, sung and unsung, have come together and joined forces in the fight against COVID-19, inspiring us with their selflessness, resourcefulness and talent.

Here at LHAG, we too have worked together, in our own way, to overcome the challenges of the pandemic and continue our practice as usual – that is, as 'usual' as the evolving world of arbitration can be – and that includes this publication. On that note, my team and I are proud to present you this collection of articles on arbitration- and dispute-resolution-related developments in Malaysia and across the globe, with a focus on the thought-provoking year that was 2020.

We begin with **Crystal Wong Wai Chin** and **Anis Raihan Asmadi** highlighting the notable updates in the new 2021 Rules of Arbitration of the International Chamber of Commerce (ICC), which cover virtual hearings, consolidation and joinder, and third-party funding. Crystal and Anis then compare the ICC's new arbitration rules to their counterparts in the rules of the London Court of International Arbitration, the Singapore International Arbitration Centre, and Malaysia's own Asian International Arbitration Centre.

We then explore the exciting world of online dispute resolution (ODR) – a field not of the future, but of the present, that could match or even outdo humans in the speed, cost, quality and even fairness of dispute resolution outcomes it can achieve. To demonstrate this, **Teh Wai Fung** showcases three powerful ODR models already in use, stretching from the pre-dispute stage of amicable negotiations to electronic discovery in full-fledged litigation and arbitration. It will be seen that ODR is something any future-thinking business looking to thrive in the long term must understand and embrace.

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FOREWORD (CONT'D)

From the digital, we turn to the tangible, as **Crystal Wong Wai Chin** and **Lee Zhe Ying** seek to demystify common misconceptions foreign players tend to have when participating in Belt and Road Initiative (BRI) projects in Malaysia, as informed by their experience advising Chinese entities doing business in Malaysia. With fundamental differences between common law jurisdictions (such as Malaysia) and civil law jurisdictions (such as China), it is crucial that foreign players unfamiliar with Malaysian law understand their rights and obligations when responding to construction disputes.

A key part of any project is the finance behind it. With **Jay Fong Jia Sheng**, we consider whether Malaysia is ready for the arbitration of finance and banking disputes, which have traditionally been the preserve of the civil courts. Financial service providers tend to prefer litigation for its predictability, familiarity and level of protection. Yet the growing trend of finance arbitration internationally shows that arbitration may already be equally capable of offering these and many more advantages (with the exception perhaps of familiarity), even in Malaysia.

By contrast, construction and engineering disputes have long been the bread and butter of arbitration. Because they are technical, success or failure often hinges on the content and quality of expert evidence, and the importance of the expert process cannot be overstated. **Lim Chee Yong**, himself trained in both engineering and law, clarifies important questions parties to these disputes commonly have – and those they may not have thought of – from how to select the right expert, through to preparation of the expert's report.

We return from engineering to law, pure and unadulterated, as **Soh Zhen Ning** considers whether and how the right to challenge an arbitral award for an error of law should be reintroduced. Since section 42 of the Arbitration Act 2005 was repealed in 2018, there have been concerns that awards replete with errors of law have been beyond the courts' review. Zhen Ning comments in particular on the proposal by the Malaysian Bar Council for the addition of a leave requirement to proceed with such challenges, and explores how to balance arbitral finality and minimal court intervention, on the one hand, and substantive fairness, on the other.

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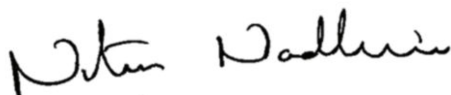
FOREWORD (CONT'D)

Having discussed the interface between arbitration and the courts, it seems right that we end our newsletter by reflecting on the key judgments of the Malaysian courts that shaped and developed Malaysian arbitration law in 2020. **Teh Wai Fung** and **Soh Zhen Ning** break down what these judgments mean – in plain English, without the legalese – and how they might affect your business. Wai Fung and Zhen Ning also acknowledge two UK Supreme Court judgments on arbitration, before previewing what 2021 has in store for Malaysian arbitration law.

In closing, I must thank Wai Fung and Zhen Ning for their additional contributions to this publication as assistant editor and coordinator respectively, and **Lee Chee Chien**, **Goh Yong Han and Koay Xian Lit** of the **Universiti Utara Malaysia Advocacy & Mooting Unit** for their stellar layout design work.

Of the many, many lessons 2020 has taught us, one that stands out personally is the importance of being prepared and managing risks promptly and adequately, whatever your role may be in the grand scheme of things. The International Arbitration Practice does this at two levels: being ready for disputes before they happen, and preparing our wider practice for the future. I hope that this publication will give you some ideas about how your business can do likewise. I wish you an engaging read!



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NEW YEAR'S RULES AND RESOLUTIONS

BY CRYSTAL WONG WAI CHIN AND ANIS RAIHAN ASMADI

In an effort to promote greater efficiency, flexibility and transparency of arbitration proceedings, the International Chamber of Commerce (**ICC**) has recently revised its Rules of Arbitration (**2021 ICC Rules**).[1] The 2021 ICC Rules came into force on 1 January 2021,[2] marking a fresh start to the new year. Notable changes include provision for virtual hearings, an expansion of the consolidation provisions, revisions to the joinder provisions, as well as the need for disclosure of third-party funding arrangements.

In this article, we seek to compare the key features of the 2021 ICC Rules with the newly revised London Court of International Arbitration (**LCIA**) Rules (**2020 LCIA Rules**), which came into force on 1 October 2020, the Asian International Arbitration Centre (**AIAC**) Rules (**2018 AIAC Rules**), and the Singapore International Arbitration Centre (**SIAC**) Rules (**2016 SIAC Rules**) (expected to be updated in the third quarter of 2021).[3]

Virtual Hearings as the New Normal

2021 ICC Rules, Article 26(1)

Under the 2017 ICC Rules, case management conferences may be conducted remotely by video conference, telephone or other similar means of communication.[4] However, with respect to the main hearing, Article 25(2) provided that *'the arbitral tribunal shall hear the parties together in person*' upon a party's request or on the tribunal's own motion.

The **ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic**, published in April 2020, clarified that the wording of Article 25(2) of the 2017 ICC Rules was only to provide parties with an opportunity for '*live adversarial exchange*', which is considered to be satisfied even if the parties conduct all or part of a hearing in the form of a virtual hearing.[5]

Under the 2021 ICC Rules, the old Article 25(2) has been removed. The new Rules appear to provide more clarity on the arbitral tribunal's jurisdiction to conduct hearings either in person or virtually.[6] Further, the conduct of such virtual hearings is not limited to only video conference, but also includes '*other appropriate means of communication*'.

The provision for '*other appropriate means of communication*' is a prescient measure to future-proof the 2021 ICC Rules. Not only does the provision take into account the current video conferencing platforms, but it also makes concessions for future technology. This will ensure the longevity and success of the 2021 ICC Rules.

2020 LCIA Rules, Article 19.2

While Article 26 of the 2021 ICC Rules was the first time the ICC expressly codified the option for hearings to be conducted virtually, the LCIA 2014 Rules already contained a provision for hearings to be conducted in this manner in Article 19.2.

The 2020 LCIA Rules' revision appears to merely clarify and expand the wording of this Article, so as to better accommodate the use of virtual hearings for both domestic and cross-border disputes.

2018 AIAC Rules, Rule 28.4[8]

Under Rule 28.4, '*the arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as video conferencing)*'.

The wording of Rule 28.4 seems to limit the option of virtual hearings to the witness testimony stage only. Nonetheless, the AIAC has had virtual hearing solutions available for the use of parties for quite some time. The AIAC seems to have further embraced the concept of digitalisation by offering parties and tribunals access to its licensed versions of the Zoom and Webex platforms.[9]

Additionally, in its effort to further facilitate virtual hearings, the AIAC is currently working on protocols for Virtual Arbitration Proceedings (VAP) and Virtual Mediation Proceedings (VMP).[10] These initiatives are a step in the right direction and will certainly be welcomed by many.

2016 SIAC Rules, Rule 19.1

While there is no specific provision on virtual hearings in the 2016 SIAC Rules, the SIAC has confirmed in its COVID-19 FAQ page[11] that the Rules do not prohibit the conduct of virtual hearings. In fact, Rule 19.1 provides that '*the Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final resolution of the dispute*'.

It is expected that the forthcoming updated SIAC Rules, which are set to be issued in the third quarter of 2021, will include more specific protocols on the use of virtual hearings. Nonetheless, in the interim, the SIAC seems already to have effectively catered for the conduct of virtual hearings and provided necessary guidance[12] for parties who wish to consider this method now.

Virtual Hearings: In Summary

While the ICC, LCIA, AIAC and SIAC have all made laudable efforts to provide virtual hearing solutions for their respective users, it is arguable whether the conduct of such hearings could adequately replace the immediacy of in-person hearings. For example, any glitch in internet connection would jeopardise the smooth running of witness testimony, and illegal activities like hacking and covert recording may compromise the security and confidentiality of the hearing. The ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic and CIArb Guidance Note on Remote Dispute Resolution Proceedings offer particularly helpful guidance on managing these risks, with suggested clauses for cybersecurity protocols and procedural orders dealing with the organisation of virtual hearings.

Changes in Multi-Party Arbitration: New Consolidation Provision

2021 ICC Rules, Article 10(b)

Under both the 2017 and 2021 ICC Rules, the ICC Court may consolidate two or more pending arbitrations between the same or different parties, so long as the parties have agreed to such consolidation.[13]

The updated 2021 ICC Rules, however, seem to have broadened the scope of consolidation involving different parties. Article 10(b) provides that consolidation may occur when '*all of the claims are made under the same arbitration agreement **or agreements***'.[14] This may mean that separate claims commenced under multiple related contracts with identical arbitration clauses can now be consolidated. Time will tell exactly how far this expansion extends.

Further, Article 10(c) stipulates that consolidation may also occur where '*the claims in the arbitrations are **not** made under the same arbitration agreement or agreements, but the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible*'.[15]

2020 LCIA Rules, Article 22.7(ii)

Similar to the 2021 ICC Rules, the 2020 LCIA Rules have enlarged their consolidation provisions to allow the consolidation of arbitrations brought under '*compatible arbitration agreement(s)… either between the same disputing parties or arising out of the same transaction or a series of related transactions*'.[16]

Additionally, under Article 1.2 of the LCIA Rules, via '*a composite Request*', a party may commence separate arbitrations against multiple respondents and under multiple arbitration agreements.

2018 AIAC Rules, Rule 10

The wording of Rule 10 of the 2018 AIAC Rules mirrors that of Article 10 of the previous 2017 ICC Rules. As such, the scope of consolidation allowed under the AIAC Rules is limited compared to the new 2021 ICC Rules and 2020 LCIA Rules.

2016 SIAC Rules, Rules 6 and 8

Compared to other institutional rules, the scope of consolidation under Rules 6 and 8 of the SIAC Rules seems wider and thus better equipped to allow for the efficient resolution of multi-party and multi-contract arbitrations.

In particular, Rule 8 provides that consolidation is permissible not only where the parties have agreed to it or where the claims in the arbitration are made under the same arbitration agreement, but also where *'the arbitration agreements are compatible*', regardless of whether they are made between the same parties.

Similar to Article 1.2 of the new LCIA Rules, Rule 6 of the 2016 SIAC Rules allows a claimant to commence multiple arbitrations via a single Notice of Arbitration for all relevant arbitration agreements.

Consolidation: In Summary

The expansion of the consolidation provisions as provided by the ICC, LCIA and SIAC Rules may prove useful in energy and construction disputes as such disputes typically arise from complex contractual frameworks, each involving numerous contracts and parties. With the arbitral institutions adopting a more liberal approach to consolidation, contract drafters should be more focused on the compatibility of related arbitration clauses when preparing project agreements. For example, if a consolidated arbitration is in fact the intended outcome, it is recommended that the arbitration agreements in all project agreements be subject to the same institutional arbitral rules.[17]

Changes in Multi-Party Arbitration: New Joinder Provisions

2021 ICC Rules, Article 7.5

Under the previous 2017 ICC Rules, '[n]*o additional party* [could] *be joined to an arbitration after the confirmation or appointment of an arbitrator, unless all parties, including the additional party, otherwise agree'.*

The new Article 7.5 now dispenses with the need for agreement from all parties, and allows the tribunal to join a third party even after the appointment of arbitrators, so long as that third party consents to the constitution of the tribunal and Terms of Reference.

Additionally, the tribunal must take into account all relevant circumstances in deciding a request for joinder including whether the tribunal has '*prima facie jurisdiction over the additional party, the timing of the Request for Joinder, possible conflicts of interest and the impact of the joinder on the arbitral procedure*'. In addition, '*any decision to join an additional party is without prejudice to the arbitral tribunal's decision as to its jurisdiction with respect to that party*'.

2020 LCIA Rules, Article 22.1(x)

Unlike the 2017 ICC Rules, the permissibility of a joinder under the LCIA Rules is not dependent on whether the tribunal has been constituted or whether all parties have agreed to it.

Instead, a tribunal has the power to allow joinder only after giving all parties a reasonable opportunity to state their views, and where both the applicant and additional party expressly consent to such joinder. Effectively, therefore, the LCIA's treatment of joinder is similar to the newly revised Article 7.5 of the ICC Rules.

2018 AIAC Rules, Rule 9

Under Rule 9 of the AIAC Rules, procedurally, a joinder may be requested before or after the constitution of the arbitral tribunal. In the former situation, the request will be decided by the Director of the AIAC.

More crucially, however, the grant of a joinder is subject substantively to the minimum requirement of either (i) the consent of all parties (including the additional party) or (ii) establishing that *the 'Additional Party is prima facie bound by the arbitration agreement*'.

2016 SIAC Rules, Rule 7

The wording of Rule 7 of the SIAC Rules is similar to Rule 9 of the AIAC Rules.

The alternative prima facie test as stipulated in these Rules is unique compared to other institutional rules. In practice, the prima facie test may be satisfied by showing that there has been an incorporation by reference, or an agency relationship between the applicant and the additional party, that results in the latter being bound by the arbitration agreement.

In effect, satisfying the prima facie test replaces the need for parties' agreement as the threshold factor that gives the tribunal discretion to consider joinder. The pros and cons of the prima facie test as a threshold test (as stipulated in the AIAC and SIAC Rules) indeed present an interesting area of discussion. On the one hand, an additional party should not be allowed to renege on its agreement to arbitrate given through the arbitration agreement. On the other hand, the prima facie test may cause unnecessary expenditure, confusion and delay as parties will inevitably forcefully challenge, at what should otherwise be a preliminary stage, whether the additional party is or is not prima facie bound by the arbitration agreement.

For now, whilst the Rules remain as they are, parties to multi-party and multi-contract transactions should perhaps consider bespoke drafting to record whether or not they agree to being joined in arbitration proceedings. Such clauses will reduce the risk of potential complications arising from the application of these institutional rules in particular cases.

Joinder: In Summary

The revision in the 2021 ICC Rules appears to have increased the threshold for a successful joinder application. Though the prima facie jurisdiction test may be satisfied, we now foresee an enhanced and/or further area for argument over whether an arbitral tribunal has jurisdiction over the additional party at all.

Disclosure of Third-Party Funding

2021 ICC Rules, Article 11(7)

The 2021 ICC Rules have included new provisions on third-party funding. Under Article 11(7), each party is required to promptly disclose '*the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration*'.

This revision has been welcomed by the arbitral community as a preventive measure to avoid conflicts of interest between arbitrators and third-party funders. It is undeniable that third-party funders have a direct economic interest in the awards eventually issued. This requirement will improve the transparency of proceedings, avoid any inadvertent conflict of interest and, most importantly, ensure the impartiality and independence of the arbitrators.

2020 LCIA Rules, 2018 AIAC Rules and 2016 SIAC Rules

The LCIA, AIAC and SIAC Rules have no provisions on third-party funding.

Third-Party Funding: In Summary

As the global arbitration scene has seen a surge in the usage of third-party funding, we are confident that other major arbitral institutions will follow the ICC's lead in devising rules or guidance notes to require disclosure of third-party funding arrangements.

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NEW YEAR'S RULES AND RESOLUTIONS (CONT'D)

Realising Potential: The Way Forward

The revisions to the ICC Rules (and LCIA Rules) are a step in the right direction to further modernise and streamline arbitration proceedings. With the new SIAC Rules forthcoming later this year, 2021 has a lot in store for the arbitral community. Closer to home, it is hoped that with the recent appointment of the new AIAC Director, greater investment in time and resources will also be made in enhancing the efficiency and flexibility of AIAC arbitrations.

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1 ICC Court of Arbitration President Alexis Mourre's statement on 8 October 2020 <https://iccwbo.org/media-wall/news-speeches/icc-unveils-revised-rules-of-arbitration/> accessed 7 January 2021.

2 The 2021 ICC Rules will apply to cases filed from 1 January 2021. Any cases submitted to the ICC and registered prior to 1 January 2021 will be governed by the 2017 ICC Rules, unless the parties have agreed otherwise.

3 The SIAC is currently reviewing its 2016 Rules and plans to release an updated set of Rules in the third quarter of 2021, as announced here. The updated Rules will include revisions on consolidation and joinder, new technology and arbitral procedure, expedited and/or emergency arbitration and powers of the tribunal.

4 2017 ICC Rules, Article 24(4).

5 ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, Section III paragraph 23.

6 2021 ICC Rules, Article 26(1).

7 Abhivav Bhushan and Sameer Thakur, 'Nothing Changes if Nothing Changes: An Introduction to the 2021 ICC Rules of Arbitration' (Kluwer Arbitration Blog, 27 October 2020) <http://arbitrationblog.kluwerarbitration.com/2020/ 10/27/nothing-changes-if-nothing-changes-an-introduction-to-the-2021-icc-rules-of-arbitration/> accessed 24 December 2020.

8 Article 28(4) of the UNCITRAL Arbitration Rules (as revised in 2013) (UNCITRAL Rules). The UNCITRAL Rules are adopted in Part II of the AIAC Arbitration Rules 2018.

9 AIAC Newsletter #02 August 2020, Virtual Hearings at the AIAC. The newsletter can be accessed here.

10 ibid.

11 SIAC COVID-19 FAQ.

12 SIAC Guide on 'Taking Your Arbitration Remote'.

13 Article 10(a) of the 2017 and 2021 ICC Rules.

14 Emphasis added.

15 Emphasis added.

16 This is provided that no arbitral tribunal has been formed for those arbitrations, or if already formed, that such arbitral tribunal(s) is (are) composed of the same arbitrators.

17 The SIAC, in December 2017, had issued a Proposal on a Cross-Institution Consolidation Protocol, which permits the consolidation of arbitrations subject to different institutional rules. Such a proposal promotes 'institutional cooperation' and aims to facilitate the efficient and enforceable resolution of international commercial disputes. It remains to be seen whether the proposal will be adopted in the upcoming revised SIAC Rules.

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Anis has recently completed her pupillage under the guidance and mentorship of Dato' Nitin Nadkarni and Crystal Wong Wai Chin. Upon being called to the Malaysian Bar, she will join the Energy, Infrastructure & Projects and International Arbitration Practice as an Associate. Anis graduated with a First Class law degree from the University of Reading, and was called to the Bar of England and Wales in 2019.

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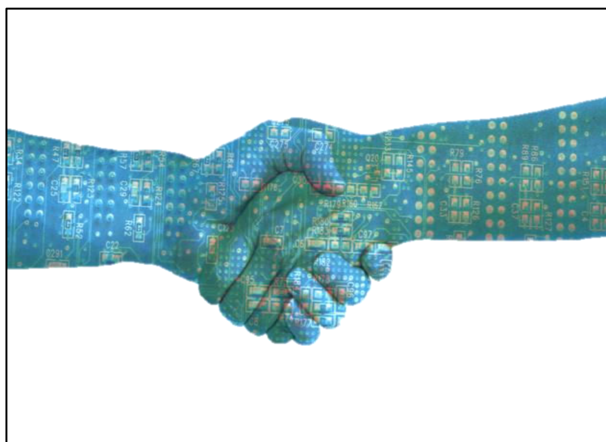
ONLINE DISPUTE RESOLUTION: A NEW WORLD ODR?

BY TEH WAI FUNG



Virtual hearings have occupied much of the legal limelight since the pandemic began, but they are only one of the myriad methods of online dispute resolution (**ODR**) already in existence that fall under the wider legal tech movement. Many ODR models promise possibilities far more transformative than virtual hearings. With the aim of highlighting ODR's true potential, this article begins by introducing ODR and why it matters. This is followed by a snapshot of just some of the exciting ODR currently available in which the role of technology is central, not merely facilitative. This article concludes by briefly acknowledging some of the challenges that ODR models like these might encounter in Malaysia.

What Is ODR and Why Should I Care?

There are many views on the exact limits of ODR's ever-evolving boundaries. For this article, it will suffice to simply accept that ODR is dispute resolution (and prevention) using technology as the 'Fourth Party'[1] (the other three being the two disputants and the neutral decision maker) to assist, facilitate, or orchestrate the process.[2] ODR outcomes can be non-adjudicative and non-binding (consensual), or adjudicative, binding and directly enforceable.[3]

Despite ODR's futuristic connotations, one of the earliest tangible forms of ODR was already in operation by 1998: the software-led online mediation pilot between eBay and the National Center for Technology and Dispute Resolution at the University of Massachusetts.[4] In Malaysia, Shopee and Lazada currently employ similar systems which incentivise buyers and sellers to resolve disputes reasonably and responsively.[5]

'So what?' sceptics may ask. 'I am not in e-commerce. ODR won't affect me.' Firstly, ODR's potential benefits go beyond simply expediting and rationalising traditional human-led methods of dispute resolution. Developments like algorithms, big data, and artificial intelligence (**AI**) could potentially achieve fairer outcomes through entirely new systems that deliver greater consistency and reduce the unpredictability of human discretion.[6] Secondly, ODR is not just a pipe dream; it will be an inescapable reality of doing business in the near future. Commercial activity continues increasingly to shift online. This means more transactions and interactions, often between strangers, which in turn means more disputes waiting to happen.[7] This is why even players beyond the legal and technology sectors, like oil and gas giant General Electric,[8] have explored in-house ODR systems. Businesses that commit to an effective ODR mechanism in case transactions go awry are more likely to earn the trust of consumers otherwise hesitant to transact online, a pivotal competitive edge online.[9] ODR is even more important for blockchain-dependent sectors like cryptocurrency, because their efficacy depends on the availability of an efficient dispute resolution mechanism.[10]

In Reality: Where is ODR Now?

That all sounds promising, but unless ODR can deliver, it will be as good as science fiction. Fortunately, there are a variety of ODR solutions already on the market that exemplify how powerful ODR already is, and how much more powerful it could one day become. This section looks at three of them.

Look Before You Leap: Data Analytics to Predict Arbitral Outcomes

Arbitration is often complicated, costly, and exhausting. Disputants which know they would probably lose in arbitration may be more determined to settle. Most depend on lawyers to assess this. Unfortunately, though some get close, no lawyer holds a crystal ball. A disputant with the best human advice may still end up with the same or even a worse outcome to what amicable settlement would have yielded – plus the wasted time, expense and energy of arbitration.

This is where predictive data analytics come in. One example is ArbiLex, a start-up that began in the Harvard Innovation Lab.[11] ArbiLex founder Isabel Yang had observed a disconnect between the quantitative legal tests practitioners and judges *say* they apply

(for instance, 'a preponderance of evidence'), and the qualitative, experience-led assessments they *actually* make.[12] Seeking to bridge this disconnect through AI and predictive analytics, ArbiLex claims to be able to quantify uncertainty, reduce errors, and maximise desirable outcomes in high-stakes international arbitration cases, in an empirical, coherent, explainable and cost-effective manner.[13] One of ArbiLex's particular fortes is its employment of Bayesian machine learning (**ML**). The Achilles' heel of traditional ML is its reliance on only observed data. This limits traditional ML's ability to perform on new, unseen scenarios,[14] which most arbitrations will be because of the confidentiality of arbitration. Bayesian ML overcomes this by relying on initial, reasonable guesses informed by expert opinion.[15]

By enabling more accurate, comprehensive quantifications of risk and prediction of outcomes in arbitration, ArbiLex can help disputants and lawyers better decide whether arbitration is worth it, and arbitrators ensure that their awards do not surprise expectations.[16]

Finding the Needle in the Haystack: Predictive Coding for e-Discovery

If one had to choose the single most costly, laborious aspect of litigation or arbitration, discovery might be a strong contender.[17] Unconstrained discovery tends to result in endless (digital) reams of documents that must be reviewed, many of which will ultimately be deemed irrelevant. This has been the bane of many a disputant ordered to dig up years' worth of documents, and the junior lawyer who has to review them – not to mention the legal fees of the exercise. The solution in some jurisdictions and under some arbitral rules has been to strictly limit the scope of discovery, but the trade-off is that a less extensive discovery process may compromise accuracy by missing important documents.

Predictive coding addresses both concerns by shifting the bulk of this burdensome discovery groundwork from the shoulders of lawyers onto computer software. It has been found to rival or even surpass traditional manual methods in speed, accuracy and consistency at a lower cost.[18]

An accessible explanation was given in *Pyrrho Investments v MWB Property*,[19] to

justify the English High Court's approval of predictive coding for e-disclosure. In very simplified terms, parties agree a predictive coding protocol defining the parameters of the process – data set, sample size, control set, and so on. A lawyer who would otherwise manually decide relevance reviews and decides on each document in a far smaller initial representative sample of the overall document set. The software identifies common concepts and language in the sample documents manually identified as relevant. Based on this 'learning', the software reviews and categorises the entire document set. There is then a quality assurance stage. A human reviews samples from the overall review. Software decisions that the human overturns are re-fed into the system for further learning. This repeats until the number of 'overturns' fall within agreed tolerances.

As this article is written, it seems that predictive coding has yet to even appear in reported Malaysian court judgments. However, a look to foreign jurisdictions suggests that predictive coding has already begun to make inroads. *Pyrrho Investments* itself was in 2016, and five years is a long time in technology. New Zealand's High Court Rules have permitted predictive coding or 'document prioritisation technology' since 2011.[20] In another 2016 case in Australia, the use of predictive coding for discovery was agreed after parties estimated that just the initial review exercise would require over 583 working weeks if conducted manually.[21] Across the causeway, in 2013, the Singapore High Court seemed to indicate that it would be receptive to predictive coding for discovery once sufficiently developed.[22]

Technology-Assisted Negotiation

Many parties to complex commercial negotiations will be well-versed in the concepts of game theory and ideas like BATNA.[23] Yet amid the posturing, guesswork and emotion of real-life negotiations, few if any will be able to remain absolutely rational and logical in applying them. Technology-assisted negotiation systems address this through fundamentally quantitative, intelligible negotiation frameworks that encourage parties to be reasonable and rational. One of the earliest models was 'double-blind bidding', first developed by Cybersettle[24] in the late 1990s.

Each party submits at least two different settlement figures: the proposed sum is disclosed to the counterparty; the concession sum is kept private. If the parties' acceptable ranges overlap, a settlement is concluded with the sum somewhere in between.[25] This simple model thrives where the sole issue is how much will be paid.

Of course, few negotiations are so simple. Where there are multiple issues to be agreed, a more sophisticated system is needed. One such system is Smartsettle Infinity,[26] founded on the same basic idea but far more elaborate. Parties begin by identifying the issues for agreement. For each, a party submits the range it is willing to accept, and, in numbers, the relative importance of succeeding on that issue. Because a party's satisfaction may not vary exactly linearly against each unit variance of an issue, a party can also input specific 'satisfaction points' on a graph. Each party submits four packages – optimistic, concession, fair, and unacceptable – and chooses one to propose. The system itself also automatically suggests packages. On the other side, the counterparty can choose to secretly accept a proposed package. If no settlement is reached, parties can then propose their concession packages. To minimise bias, parties can submit a 'masquerade', which is a package actually by one party but presented to the other as a suggestion by the system. This repeats until parties agree a deal or break off negotiations.

The beauty of Smartsettle Infinity is that it embeds systematic, quantitative, objective-led principles at the heart of each party's approach, while encouraging reasonable concessions and ultimately settlement through features like suggested packages and masquerades.[27]

Barriers to Change: Human and Technological

The intention here has been to showcase just a fraction of ODR's present to excite interest in its future. But that is to say nothing of the obstacles ODR must overcome, generally and specifically in Malaysia. Many of the general challenges will be obvious: trust, cost, and of course the capability of the technology itself. Any invention that claims to replace or outdo human professionals is typically viewed with initial scepticism. Especially for the most complex, high value disputes, many will still prefer their gut instinct to a series of indecipherable algorithms. This is crucial for judges and arbitrators who must justify their decisions by reasons.[28] The catch-22 is that the better

a technology is at emulating human reasoning, the more enigmatic the codes behind it are likely to seem to sceptics. Furthermore, although the savings achieved by automating larger scale exercises are immense, smaller tasks below the critical mass are unlikely to justify the still considerable up-front costs of these advanced technologies.[29]

There will also be hurdles either particular to or accentuated in the Malaysian context. One that jumps out is whether developers have any incentive to program a system that can also handle, for instance, Malay, Tamil, Chinese dialects, or even 'Manglish' – alone or even in combination. Some court judgments are in Malay, others in English. Businesses' formal documents and verbal communications are often in a mix of languages with a Malaysian tinge. Another critical piece of the puzzle is a robust, practical regulatory framework. If ODR is not mandatory or an ODR outcome is not legally binding or directly enforceable, an unsatisfied party would have no incentive not to skip ODR and go straight to court or arbitration.[30]

With time, publicity, and education, one hopes that minds will open up to ODR and costs will drop, aided also by greater demand. When that happens, the political will to legislate for ODR should (in theory) pick up. Similarly, the breath-taking pace at which technology can evolve to solve seemingly impossible problems should never be underestimated.

The Power in Our Hands

In an increasingly digital, globalised world, transactions – and, with them, disputes – will multiply in volume, value, and nature. ODR will be not merely exciting but essential to meet that future. The idea of ODR is not new, but the solutions it continues to generate are. To survive and stay ahead of the curve, businesses and legal practitioners would do well to seriously consider the ODR solutions that have already arrived. Whether the objective be predicting outcomes more accurately, ploughing through millions of documents more reliably, or conducting negotiations more rationally, humans will soon have to accept that machines could soon (once again) match or even outdo them. The road to widespread adoption of ODR in Malaysia is nevertheless replete with obstacles. Some are technological, but the most stubborn ones – acceptance, cost, and regulation – are categorically human. As the technology moves forward and ODR gains visibility, the decisive question will not be whether ODR is capable, but whether humans will give it a chance.

ONLINE DISPUTE RESOLUTION: A NEW WORLD ODR? (CONT'D)

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LHAG ADVOCATES AND SOLICITORS

BRI PROJECTS IN MALAYSIA: DEMYSTIFYING COMMON MISCONCEPTIONS

BY CRYSTAL WONG WAI CHIN AND LEE ZHE YING

Seven years into the Belt and Road Initiative (**BRI**), the pandemic-ridden 2020 has been nothing short of a whirlwind of uncertainties and global downturns. Malaysia, rated as a '*high opportunity, low risk*'[1] core BRI country, has always been regarded as an attractive BRI destination with a competitive economy. Although many BRI projects are being delayed, put on hold or re-negotiated as a result of various pandemic-related disruptions, most major projects in Malaysia have not been cancelled.[2]

As the year draws to a close, this article seeks to debunk some recurring misconceptions that foreign BRI players tend to have, especially those originating from civil law jurisdictions, venturing into the BRI market in Malaysia.[3]

A. Pre-Contractual Stage

1. 'I can close a deal as long as parties agree on the contract sum and major clauses. The law will take care of the rest.'

The general perception is that contracts drafted in common law jurisdictions (such as Malaysia) are longer and more exhaustive, when compared with contracts made in civil law jurisdictions (such as China). This is primarily attributable to the fundamental differences between common law and civil law legal systems, with civil law systems tending to be more prescriptive and allowing contracting parties to rely on underlying codified rules.

This fundamental distinction frequently results in a mismatch of expectations for civil law contracting parties entering into legally binding relationships for the purpose of their business ventures in common law countries. For instance, parties may agree simple contracts that omit terms believed to '*go without saying*', only to realise when disputes arise that various rights and obligations have not been (impliedly) incorporated into the contracts.

The importance of prudent contract drafting in common law jurisdictions cannot be overstated. As the legally binding document that governs parties' respective rights and obligations, a contract is the cardinal instrument scrutinised by courts or tribunals when resolving disputes between the parties. Because contract law in common law jurisdictions is underpinned by the doctrine of freedom of contract, common law courts and tribunals generally seek to uphold the parties' intentions[4] when interpreting a contract.

With these differences in mind, parties should adopt a comprehensive approach when agreeing contracts by expressing all agreed terms, with the aim of demarcating as clearly as possible the allocation of risks and responsibilities between themselves. Some of these crucial terms include:

- **Contracting parties:** The most common contracting entity in Malaysia is a locally incorporated private limited company. The significance of this is that the company is a separate legal entity distinct from its shareholders and directors. Only in exceptional cases[5] will the 'separate legal entity' principle give way to make shareholders and/or directors liable.
- **Good faith obligations:** While many civil law jurisdictions codify the duty of good faith, most common law jurisdictions[6] do not generally impose any such duty by default, save for certain categories of contracts[7] in which the duty may be implied.
- **Termination:** The grounds upon which a contract may be terminated are not codified in common law jurisdictions.[8] In the absence of express termination clauses in a contract, the right of an innocent party to treat itself as having been discharged from the contract is mainly premised on the grounds of repudiation or fundamental breach.[9]

Where multiple contractual documents are involved, the order of precedence of these documents (in the event of inconsistency) should be expressly stated to avoid any ambiguity.

B. Contract Execution Stage

2. 'I am entitled to suspend works because the Employer owes me substantial payments under the Contract.'

A party has no general right at common law to withhold performance of its contractual obligations on the ground of non-payment by the other party, unless the contract terms

expressly provide that right.[10] This stands in contrast to the codification of that right in civil law jurisdictions,[11] which allow an unpaid party to suspend performance until the payment default is rectified.

For construction contracts, this difference in expectations of legislative or judicial protection often results in a contractor unaware of this distinction being left with only two choices: continue works at its own increasing cost, aggravating cash flow issues, or risk being sued for breach of contract.

Many standard form construction contracts, such as those of the Malaysian Institute of Architects (PAM),[12] FIDIC[13] and the Public Works Department (PWD),[14] contain express provisions for the suspension of works by an unpaid contractor. However, whether this contractual right can be invoked in a given scenario depends on the actual words used in the clause. Parties should take care to ensure that conditions have been fulfilled, and comply with all procedural requirements, before actually effecting a suspension.

3. 'I think the works are outside of the current contractual scope, but I will carry out the works first nonetheless, and claim for additional payment later.'

A contractor's entitlement to additional payment under a contract often comes with 'strings attached'. For instance, the contract may require advance written notice, followed by submission of claims backed by full particulars and supporting documents, within a specified time.

In Malaysia, the courts are typically inclined towards requiring strict compliance with claims procedures, especially where the language of the contract is clear and mandatory.[15] This is equally true of claims for variation works and backcharges. Contrast this with the approach of the Chinese courts, which have (until recently) been relatively lax in enforcing compliance with these procedures, giving greater emphasis to the substantive merits of a dispute to achieve justice between parties.

As such, there can often be an information asymmetry between the contract management team, and the project team that executes the day-to-day work on site. Where the necessity for strict compliance with conditions precedent is not adequately appreciated, resulting in delays or failures in compliance, a party may find itself disentitled from an otherwise valid claim.

This accentuates the importance of establishing streamlined document management systems and proper record-keeping. Particularly for large-scale projects which span multiple years, failing to implement these practices – including effective document

handover protocols to deal with employee turnover – may make it challenging to gather the evidence necessary to support a claim.

C. Post-Contract Stage

4. 'If there is significant sum due and owing to me, I can choose to remain on site even after the contract is terminated, or after the project is completed.'

To an unpaid party, it may appear strategically attractive to continue occupying a site after a contract has been terminated or a project completed. The aim is typically to exert pressure on the non-paying party or to prevent a new contractor from taking over and executing the works. However, this action is rarely legally permissible in common law jurisdictions.

Rather, many construction contracts impose express obligation on contractors to vacate a site upon termination of the contract or completion of a project, whether or not the employer is in breach of the contract. A court or tribunal may even imply a term that, in the event of a complete breakdown in relationship between parties to a construction contract, the contractor must surrender the site to the owner and seek its remedy against the owner for breach of contract through litigation or arbitration.[16] Courts are likely to enforce these provisions upon the application of owners by granting a mandatory injunction to compel a contractor to vacate site.

5. 'If a counterparty fails to pay, I can recover the outstanding sum by commencing or joining winding up proceedings against the holding company.'

The threshold for piercing the corporate veil in Malaysia is very high.[17] Unless that threshold is met, or there is a separate corporate guarantee, a judgment creditor in Malaysia typically has no recourse against a parent, subsidiary or related company of the judgment debtor.

Therefore, where a defaulting party does not comply with an order to pay, a judgment creditor usually resorts to winding up proceedings against the judgment debtor to recover the debt. However, as a winding up order operates in favour of all creditors, unsecured creditors may gain little or nothing from the eventual realisation of assets. Recovery depends heavily on the surplus (if any) after secured creditors are paid.[18] In this way, a contractor in Malaysia has less protection than contractors in the Chinese construction sector, which enjoy a statutory priority in recovering contract sums from construction project developers.[19]

These potential challenges in debt recovery later down the line underline the importance of due diligence on prospective business partners to ascertain their financial standing and credibility at the very start of the process, before committing to long-term commercial relationships.

D. Treading Beyond 2020

As the pandemic's severe infection rates show no definite signs of abating in 2021, economic uncertainty looks likely to continue at a macro level. Cross-border BRI players should therefore be prudent and invest in proper legal advice to understand the legal nuances of different jurisdictions, in order to safeguard their commercial and legal interests, especially in preparation for the challenging period of post-pandemic recovery ahead.

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19 Article 286 of the PRC Contract Law provides that the construction project price shall be paid in priority out of proceeds from the liquidation or auction of the project.

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LH AG ADVOCATES AND SOLICITORS

FINANCE ARBITRATION: EMBRACING DIVERSITY OF DISPUTES

BY JAY FONG JIA SHENG

'If it ain't broke, don't fix it.' Historically, financial service providers have adopted this mindset in opting for court proceedings as their preferred method of dispute resolution.[1] Through this lens, the courts may appear to offer greater predictability (because of binding precedent[2]), better protection through interim procedures, and, most importantly, familiarity, compared to other forms of dispute resolution.

In recent years, parties to banking and financial disputes have increasingly instead adopted arbitration to resolve their disputes. In the London Court of International Arbitration (**LCIA**), the percentage of administered arbitration proceedings relating to the banking and finance sector increased from 29% in 2018 to 32% in 2019.[3] Likewise, the Hong Kong International Arbitration Centre (**HKIAC**) saw an increase of 50% between 2017 and 2018 in the number of arbitrations concerning banking and finance disputes.[4]

The growth in popularity of arbitration to resolve banking and finance disputes (**Finance Arbitration**) raises the question of what types of disputes are suitable for Finance Arbitration. That turns largely on whether Finance Arbitration may be more effective and equipped to handle transactions in these sectors than traditional perspectives might hold. In turn, that depends in large part on the adequacy of the arbitral framework available for Finance Arbitration. This article seeks to explore these three questions.

Types of Transactions: What Financial Transactions are Suitable for Arbitration?

Arbitration is suitable for disputes arising from most banking and finance transactions, such as loan agreements,

security arrangements and bonds. Arbitration is especially useful for resolving complex financial claims, such as priority-of-payment disputes between noteholders in connection with structured investment vehicles and collateralised debt obligations.[5] As explained further below, this is because parties can appoint arbitrators with specialised knowledge of these types of transactions to decide the dispute.

For example, a major driver of the increased adoption of Finance Arbitration was the publication of the '2013 Arbitration Guide' by the International Swaps and Derivatives Association (**ISDA**). In this Guide, the ISDA introduced Finance Arbitration to resolve disputes arising from its master agreement (**ISDA Master Agreement**). The ISDA Master Agreement is the standard contract for over-the-counter (**OTC**) derivatives transactions.[6] As such, except where an OTC derivatives agreement expressly excludes the use of arbitration, all OTC derivatives disputes are suitable for Finance Arbitration.

However, transactions or disputes which involve regulatory or criminal elements, such as corruption, bribery and money laundering, may not be suitable for arbitration. This is because it is likely to be difficult to reconcile the objectives of public policy and criminal regulation with the interests of private parties.[7] As such, where a seemingly legitimate contract is used in reality as a façade to illegitimately divert assets (ie money laundering), an arbitral tribunal dealing with that contract may opt to (a) refuse to consider the dispute, subject to the governing substantive law, or (b) address the (alleged) white collar crime in line with a relevant principle of international public policy, or (c) apply the law of the seat of the arbitration (lex situs) rather than the law of the place where the contract was made (lex contractus) to ensure the enforceability of the arbitral award.[8]

Why Opt for Finance Arbitration Instead of Litigation?

Speedy and discreet resolution are almost always paramount when handling financial disputes. If a dispute becomes public and protracted, market confidence will likely suffer, which may in turn deter investment.[9] There is often the added complexity of fast and ever-changing rates and values which may affect, or be affected by, the financial transaction in dispute. This is where the confidentiality, flexibility and often greater availability of expertise in arbitration come to the fore.

Confidentiality

One hallmark of arbitration is its confidentiality. Proceedings are conducted behind closed doors. No part of the arbitration proceedings – including material disclosed, findings of fact and the arbitral award itself – can be disclosed to a third party without the arbitral parties' consent.[10] The default practice of arbitral awards not being published has sometimes been highlighted as leading to a lack of legal precedent, which in turn may reduce the foreseeability and certainty of decisions in future disputes.[11] Two responses may be made to this point, one general to arbitration overall and the other specific to Finance Arbitration.

Firstly, the principle of binding precedent, stare decisis, may not necessarily be regarded as an unqualified positive or even as essential in every jurisdiction. Unlike common law jurisdictions (such as Malaysia, Singapore, and England and Wales), civil law systems (such as China, Indonesia, Japan, South Korea and most of Continental Europe) generally do not subscribe to stare decisis.

From the long-term perspective of the wider community of all involved in both arbitration and litigation, the reduced output of binding judicial precedent may be seen as giving tribunals or even civil courts more room to reach the 'right' decision on a dispute's unique facts, precisely because there is less binding precedent overall to restrict them. From the immediate perspective of parties to an individual arbitration, a tribunal generally will, in any event, still apply what binding judicial precedent does exist.[12]

Secondly, certain transactions require a high level of standardisation in regulation and treatment, such as derivatives and syndicated lending.[13] For these transactions, the importance of precedent may trump confidentiality, even where a dispute is resolved through arbitration. As such, parties sometimes agree for the award to be published on condition that the award is published in a redacted form, to preserve the confidentiality of the matter while still supporting standardisation.[14]

Speed and Flexibility

While some arbitral proceedings may appear to take longer than court proceedings, this is typically more a function of the greater complexity on average of matters in arbitration as opposed to court, and the limited availability of the counsel and arbitrators in demand for such matters, rather than an inherent deficiency in the arbitral process.

Otherwise, the vast majority of arbitral proceedings offer a speedier dispute resolution process compared to litigation.

In particular, precisely because of the flexibility of arbitration proceedings, parties are in control of procedure, including the length of the proceedings. In an arbitration agreement, parties can fix a time limit or a timetable for the whole process up to the issuance of the arbitral award. Parties may also include a 'right to choose' under the arbitration agreement to allow parties to opt between a standard procedure (eg the Asian International Arbitration Centre (**AIAC**) Arbitration Rules) and an expedited arbitration procedure (eg the AIAC Fast Track Arbitration Rules (**Fast Track Rules**)). Under the Fast Track Rules, the arbitral award must be issued within 180 days from the start of the arbitration, and parties may agree to proceed without an oral hearing and rely solely on the documents exchanged,[15] similar to the summary disposal and early determination procedures offered by the HKIAC and the Singapore International Arbitration Centre (**SIAC**).[16]

Given that time is often of the essence in financial disputes, these types of summary procedure can be especially useful for securing urgent interim protections, or enforcing simple debt claims to which there is no credible defence. These are in addition to the growing practice of strict 'chess clock' time limits in arbitration hearings,[17] and many other flexibilities in arbitration which can indirectly speed up proceedings. Where parties and tribunals make use of these options, arbitration can indeed be faster than litigation.

Expertise of Arbitrators

Finally, while the vast knowledge of judges is undoubtable, there may still exist certain matters in which judges may not have specialist expertise. This is especially in relation to matters of high complexity and technicality, such as synthesised debt obligations, back-stop facilities, convertible preferred equity certificates, gun jumping and parallel debt. Unless a particular judge happens to have that expertise, it would be almost impossible for counsel to fully explain such concepts to a judge within the time constraints of a judge's case load.[18] Furthermore, in striving to uphold their independence, judges may inadvertently become somewhat removed from political and market realities. This may create a

disconnect between the business world and the judicial administration of justice.[19] To address this disconnect, parties can instead appoint an arbitrator with expertise in the particular field or industry to decide their dispute.

Framework for Finance Arbitration

Once the suitability and advantages of Finance Arbitration are recognised, the question of an appropriate framework for Finance Arbitration remains.

In Malaysia, in 2013, the AIAC (then the Kuala Lumpur Regional Arbitration Centre) introduced the AIAC i-Arbitration Rules. These Rules are Shariah compliant procedural rules suitable for arbitrations arising from commercial transactions that are premised on Islamic principles. They are based on the AIAC Arbitration Rules with modifications, including specific procedures to refer questions to an independent shariah advisory council or a shariah expert. They are the first shariah-compliant arbitration rules globally and have gained international recognition since introduction.[20]

Admittedly, apart from the AIAC i-Arbitration Rules, Finance Arbitration has so far seen little development in Malaysia. This does not mean that Finance Arbitration is not viable in Malaysia. Parties may still consider arbitration under the Panel of Recognised International Market Experts in Finance (**PRIME**) Rules (**PRIME Rules**), administered by the Permanent Court of Arbitration,[21] or an ad hoc arbitration by adopting only the relevant PRIME Rules – in either case seated in Malaysia for cost-efficiency.

In 2012, with Finance Arbitration growing in popularity, PRIME was launched in the Hague, the Netherlands. PRIME is often considered among the most established Finance Arbitration frameworks. For instance, the ISDA has included a range of PRIME model arbitration clauses in the ISDA's Arbitration Guides. The PRIME Rules offer a specialised mechanism for resolving disputes involving complex financial contracts. The PRIME Rules' features include expedited proceedings and emergency arbitral proceedings.[23] The former allows timelines set out in the PRIME Rules to be shortened, whereas the latter requires an arbitral award to be issued within 15 days from transmission of the application for the appointment of an Emergency Arbitrator.

ADVOCATES AND SOLICITORS

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FINANCE ARBITRATION: EMBRACING DIVERSITY OF DISPUTES (CONT'D)

In Hong Kong, the Finance Dispute Resolution Centre in Hong Kong was established with the aim of resolving disputes between financial institutions and their customers. Similarly, Malaysia has her own Securities Industry Dispute Resolution Center (**SIDREC**) and Financial Mediation Bureau (**FMB**). SIDREC was established by the Securities Commission to resolve capital markets-related disputes involving monetary loss between individuals or sole proprietors and SIDREC members. FMB was established by Bank Negara Malaysia to resolve financial disputes between financial institutions and their customers.

While they share similar objectives, the Malaysian institutions currently offer only mediation and adjudication, unlike the Finance Dispute Resolution Centre in Hong Kong which administers arbitration. It is hoped that the increased adoption of Finance Arbitration globally will spur more developments in Malaysia to meet growing demand, particularly to match AIAC's trailblazing achievements in Islamic Finance Arbitration.

When Will Finance Arbitration Gain Traction in Malaysia?

As the Malaysian economy modernises, financial instruments and models – and disputes arising out of them – will continue to grow in number, volume, complexity and technicality to meet the financial needs of players at all layers of the economy. Although the civil courts have traditionally been the default, even exclusive, forum for resolving banking and finance disputes, Finance Arbitration arguably offers several important advantages over the relative rigidity of litigation, including confidentiality, parties' procedural autonomy (including over timeframes), and the option of choosing arbitrators with specialised expertise. Parties should not be put off by the lack of a Malaysian arbitral framework for non-Islamic banking and finance disputes either, for a well-established framework is already available to them to adopt, the PRIME Rules. While change will not happen overnight, banking and finance players can expect Finance Arbitration in Malaysia to grow slowly but surely.

LH AG ADVOCATES AND SOLICITORS

FINANCE ARBITRATION: EMBRACING DIVERSITY OF DISPUTES (CONT'D)

1 Jake Lowther, 'Hong Kong Arbitration Week Recap: Private Equity, Financial Services and Insurance Disputes – Don't Hesitate to Arbitrate!' (*Kluwer Arbitration Blog*, 21 October 2019) <http://arbitrationblog.kluwerarbitration.com/2019/10/21/hong-kong-arbitration-week-recap-private-equity-financial-services-and-insurance-disputes-dont-hesitate-to-arbitrate/> accessed 24 November 2020; Queen Mary, University of London and PriceWaterhouseCoopers PLT, *Corporate Choices in International Arbitration: Industry Perspectives* (2013) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/pwc-international-arbitration-study2013.pdf> accessed 24 November 2020.

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4 HKIAC, *Annual Report: 2017 Reflections*; HKIAC, *Annual Report: 2018 Reflections*.

5 Matteo Zambelli, 'LIDW 2019: The Rise of Arbitration in Financial Services Disputes, 7 May 2019' (*Kluwer Arbitration Blog*, 8 May 2019) <http://arbitrationblog.kluwerarbitration.com/2019/05/08/lidw-2019-the-rise-of-arbitration-in-financial-services-disputes-7-may-2019/?print=print> accessed 26 November 2020.

6 ISDA, *Legal Guidelines for Smart Derivatives Contracts: The ISDA Master Agreement* (February 2019) <https://www.isda.org/a/23iME/Legal-Guidelines-for-Smart-Derivatives-Contracts-ISDA-Master-Agreement.pdf> accessed 26 November 2020.

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8 Andrew de Lotbiniére McDougall, 'International Arbitration and Money Laundering' (2005) 20(5) American University International Law Review 1021.

9 Bahar Hatami Alamdari (n 7).

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11 Kathryn A Sabbeth and David C Vladeck, 'Contracting (Out) bailii.org/bailii/lecture/04.pdf> accessed 26 December 2020.

Rights' (2009) 36(4) Fordham Urb L J 803; Lord Thomas of Cwngiedd, 'Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration: The BAILII Lecture 2016', British and Irish Legal Information Institute website (9 March 2016) at 12 <https://www.bailii.org/bailii/lecture/04.pdf> accessed 26 December 2020.

12 'Generally', because the right to challenge arbitral awards on questions of law under the former Arbitration Act 2005, s 42 was repealed in 2018, but may soon return: see Soh Zhen Ning's article, 'Reinstating Section 42 of the Arbitration Act 2005: A Desirable Way Forward for Malaysia'. Note also that UNCITRAL Arbitration Rules (as revised in 2013), art 35(2), which is part of the Asian International Arbitration Centre Rules, allows parties to authorise a tribunal to decide a dispute 'ex aequo et bono', which loosely means 'based on fairness rather than strict law'.

13 Timothy J McCarthy, Richard A De Palma and Shaun D McElhenny, 'International Arbitration by Financial Institutions: Current Practices and Opportunities' (ABA Section of International Law, May 2017) <https://www.thompsonhine.com/uploads/1137/doc/USA_Article_-_IFPS_Committee_Newsletter0.pdf> accessed 4 December 2020.

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15 Yap Yeow Han, 'A General Introduction to International Arbitration in Malaysia' (Lexology 4 August 2020) <https://www.lexology.com/library/detail.aspx?g=39692e23-bb67-4c93-b6af-3d6244c42cf2> accessed 4 December 2020.

16 Article 43 of the HKIAC Administered Arbitration Rules 2018; Rule 29 of the SIAC Rules 2016.

17 ICC Commission Report, *Controlling Time and Costs in Arbitration* (2018, 2nd edn), paras 69, 75-81; David J A Cairns, 'Oral Advocacy and Time Control in International Arbitration'.

18 Klaus Peter Berger, 'The aftermath of the financial crisis: why arbitration makes sense for banks and financial institutions' [2009] Law and Financial Market Reviews 54.

19 Francisco Cabrillo and Sean Fitzpatrick, *The Economics of Courts and Litigation* (Edward Elgar Publishing Limited 2008) 17-19.

20 Nivedita Venkatraman, 'Revisiting Islamic Finance Arbitration: An Opportunity for Malaysia?' (*Kluwer Arbitration Blog*, 21 December 2020) <http://arbitrationblog.kluwerarbitration.com/2020/12/21/revisiting-islamic-finance-arbitration-an-opportunity-for-malaysia/> accessed 24 December 2020.

21 The Permanent Court of Arbitration in the Hague, the Netherlands is the world's oldest arbitral institution.

22 Article 2A of the PRIME Arbitration Rules.

23 Article 26a and Annex C of the PRIME Arbitration Rules.

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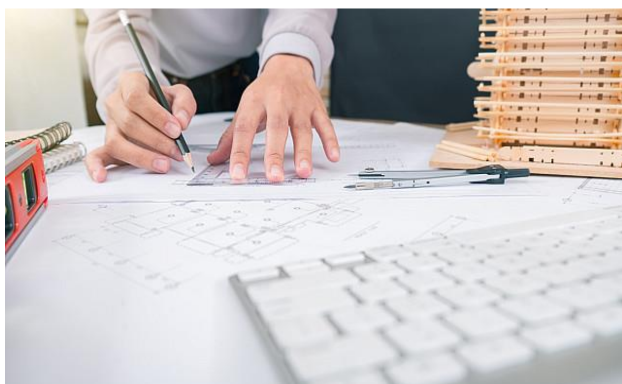
MANAGING EXPERT WITNESSES IN CONSTRUCTION AND ENGINEERING DISPUTES

BY LIM CHEE YONG



Expert witnesses have been thrust into the limelight in recent years, reflecting the sustained rise in construction arbitrations both domestically[1] and internationally.[2] In international construction and engineering arbitrations, disputes are often technically and factually complex. Expert witnesses are therefore the norm and not the exception. Expert evidence alone does not determine the entire outcome of an arbitration. However, the increasingly heavy reliance on expert evidence by tribunals and parties makes the effective handling and execution by counsel of the overall expert process a critical factor for a successful outcome. This article details some of the best practices for selecting expert witnesses, managing the party-expert relationship before a hearing, and handling expert witnesses during a hearing.

Selecting Experts

Shortlisting Experts

The first and arguably most crucial step of the process is to identify potential expert candidates for your case. Professionals advertising themselves as experts are in abundance; finding an expert suitable for your particular dispute, however, may be tricky.

Online databases, such as the table compiled by leading ranker Who's Who Legal,[3] now complement the traditional method of referral through word of mouth. As with ranking tables for arbitrators and legal counsel, the ability of parties to now submit and share anonymous reviews of experts they have engaged in previous proceedings allows for greater transparency about the performance of a given expert. Parties should also work alongside their legal counsel in identifying experts who are suitable for a given dispute, as they may have experience not only of the requirements of expertise for the type of dispute in question, but also of the working style and ability of a particular expert candidate.

Pre-Engagement Interview

Once an expert is shortlisted, he must be interviewed before being engaged. Although the pre-engagement interview is often overlooked, it is critical to the assessment of an expert witness's suitability. Parties must not shy away from grasping this opportunity to question a potential expert witness on his experience and suitability for the role.

To help a candidate understand the requirements of the brief, parties should consider whether it is possible to share details of the dispute at an early stage. This will also enable parties and counsel to immediately get an indication of the expert's initial thoughts on the dispute and decide whether they align with a party's case theory. Where this would require highly sensitive material to be shared (as is often the case in engineering disputes), parties should perhaps agree additional confidentiality obligations with the candidate, such as in a non-disclosure agreement, before releasing the information.

Due Diligence on an Expert's Background

It will be clear from the discussion above that an expert witness must possess the right professional background and qualifications. As well as the information given by the expert himself, it may also be appropriate to conduct background checks on the expert's prior publications and academic papers, to ensure that the expert has not previously taken a contradictory position to a party's intended position in the dispute. Failure to undertake this due diligence may lead to unwelcome, damaging surprises during the hearing.

Turning to professional accreditation, it is advisable that any expert engaged must be registered with the appropriate professional body. For example, an expert witness giving evidence on an engineering matter should be accredited and registered as a Professional Engineer (PE). On the other hand, a quantity surveyor should be registered with the Board of Quantity Surveyors Malaysia. Whilst professional accreditation is not a strict requirement, the evidence of an expert recognised by the appropriate governing body is likely to be given greater weight than that of an unaccredited expert.

Specialist, Not Generalist

'Stick to your knitting', so the saying goes. Parties must ensure that the expert witness refrains from giving evidence beyond the scope of his expertise. Expert witnesses who attempt to give expert evidence on areas in which they lack qualification and/or experience will undermine their credibility before the tribunal, and instead open the floodgates to a painful cross-examination.

The need for more than a general knowledge of the subject matter of a dispute was underscored in *Proton Energy Group SA v Orlen Lietuva*.[4] Orlen's expert's experience in the oil and gas industry was as a consultant for the acquisition of oil field properties. He attempted to give evidence on trades involving the sale and shipment of crude oil, of which he had no experience. The English Commercial Court dismissed Orlen's expert evidence as being based on a '*set of impressions, not based on firm evidence or solid experience*'.[5]

It is therefore essential to ensure that an expert's experience and qualifications are relevant, and that this experience is direct and substantial, rather than secondary or superficial. Parties will also benefit from engaging an expert whose experience is fairly recent, as compared to one whose last relevant experience came many decades ago.

Identify Conflicts of Interest Up Front

Given the increased importance and involvement of expert witnesses in disputes, there is a growing trend of individual experts or small consulting firms being absorbed into larger global consulting firms. The upside to this is an immediately recognisable brand under one umbrella.

However, because these large firms often have subsidiaries and teams working in silos scattered around the world, there may sometimes be a greater risk of potential conflicts of interest. The English Technology and Construction Court recently held[6] that the fiduciary duty and duty of undivided loyalty of a global consulting firm extends to the global group of companies, not just the local subsidiary where an expert engagement is sought. This applies even where the consulting firm is able and willing to ensure electronic and physical barriers between the two project teams in question.

As such, parties – and, to a large extent, legal counsel – must probe beneath the surface by being proactive in identifying potential conflicts of interest when approaching an expert. Leaving conflicts to reveal themselves only at a later stage, or worse still to be raised by an opponent in the hearing, could result in embarrassment, wasted expenditure, and, most damagingly, expert evidence being discredited.

Managing Experts Pre-Hearing

Nationality and Cultural Background of an Expert

The nationality of an expert witness in itself is unlikely to have any impact on a dispute. Cultural nuances, however, whilst unlikely to be the top of the agenda in any dispute, nonetheless play a silent role in affecting how expert evidence may be perceived by a tribunal. To quote Karen Mills[7], a leading international arbitrator, '*How can a mediator or arbitrator evaluate a statement, answer, or the conduct of a party or witness without understanding the cultural forces at work beforehand?*'

The importance of cultural nuances thus should not be downplayed as a triviality. An expert may be extremely reluctant to say 'no' or to overtly criticise an opposing expert, especially where the opposing expert's style, in stark contrast, is to invariably disagree or criticise from the get-go. Parties should give due consideration to how opposing experts of different cultural backgrounds may interact (and, by extension, the interactions between opposing counsel, experts, and the tribunal). This will minimise the risk of an expert being overly assertive or submissive towards his counterpart.

Selective Disclosure of Information to Experts

Once an expert is engaged, parties should ensure that he has access to, and is given full information on, all the underlying facts relevant to his expert opinion. While a counsel's primary role in a dispute is (within reason) to present his party's case in the best possible light, this must give way to a frank, objective, unpolished presentation of the true facts when working with an expert. If an expert witness is allowed to accept a parties' actual or intended pleaded case at face value without scrutiny, the expert may find his credibility being called into question later on when his understanding of the facts is subsequently proven inaccurate.

Scope of Engagement and Expert Report

To align expectations and avoid misunderstandings on deliverables, parties should work with counsel to draw up a written agreement specifically defining the scope of an expert witness's engagement. Without a clearly delineated scope, an expert witness can easily stray off along the rabbit trails of his own ideas, and in doing so depart significantly from the case theory and what is required of him.

Parties must also ensure that an expert witness comprehensively sets out the reasons for his opinion in the report, including factual assumptions. A tribunal will give little weight to unsupported statements. If the expert deems any documents or information irrelevant, the party must work alongside counsel to ensure that the expert report provides at least a brief explanation of why the expert has not incorporated them, as opposed to ignoring them outright.

The Right Time to Engage an Expert

Save for the limited circumstances where the expert evidence required is relatively straightforward, it is usually advisable for parties to get expert witnesses to collaborate with the legal team from the very beginning. This will ensure that a party's case theory remains streamlined, focused and consistent throughout the entirety of the proceedings. Otherwise, the risk of a last-minute change in case theory or legal strategy may prove costly and detrimental.

Involving expert witnesses early on will support counsel's work in identifying the strengths and weaknesses of a case at the outset. The importance of expert witnesses' input in reviewing legal pleadings and witness statements cannot be understated. Of equal importance, expert witnesses can play a leading role in the discovery process by identifying the (potential) documents that might make or break a case.

Expert Evidence Involving Proprietary and New Technologies

The selection of an expert witness for disputes involving cutting-edge technologies or new frontiers requires even more caution. Parties will often find that there is no single universally accepted school of thought on the subject matter because of the relative infancy of the industry. There may be numerous competing voices each seeking to make its mark as the authority on the discipline.

When shortlisting an expert witness for such disputes, parties may wish to ensure that the expert witness (who is likely to be one such competing voice) does not inflexibly confine himself to his line of thought without fairly considering competing views. Commentators have also called for judicial determinations based on expert evidence on novel methodologies or theories to be founded on 'stable' bodies of knowledge, and not on knowledge at the 'cutting edge of scientific discovery'.[8] The overarching criterion in this respect is that an expert witness must be seen as reasonable and not self-serving.

Experts During the Hearing

Parties Should Not Interfere with an Expert's Independence

An expert witness's primary role is not to appease his paymasters. It is not to 'win' the case for the party. Instead, an expert is there to help the tribunal, by putting forward a well-reasoned opinion on specific technical issues. Parties must absolutely avoid placing the expert witness in a position that may result in a tribunal regarding him as a 'hired gun' whose opinions are for sale.

Independence is the keystone of an expert witness's credibility. Whilst an expert witness is, in some sense, hired to be the 'mouth-piece' of the party, an expert witness must give his technical opinion impartially, and refrain from 'moulding' that opinion to favour the party's case theory. The expert must not only *be* independent, but must be *seen* as independent and disinterested in the outcome of the dispute. Anything less, and a tribunal may disregard the expert opinion for a lack of impartiality. An expert witness's independence,[9] once impeached, is forever impeached.

Avoiding Technical Jargon

Although an arbitrator (having been appointed for a dispute) will often be armed with a wealth of experience relevant to the dispute at hand, parties should never assume that an arbitrator will understand technical jargon. Parties must ensure that the expert witness is able to use plain, simple language that is easily comprehensible to laymen.

An expert witness who can easily dissect and present complex matters to a tribunal in a coherent, understandable and straightforward manner will outshine a counterpart who uses jargon extensively. This is especially vital in construction and engineering disputes where the ability to simplify concepts can be key to effectiveness and persuasiveness. As far as possible, a tribunal should not need to ask an expert witness for a 'translation'.[10]

MANAGING EXPERT WITNESSES IN CONSTRUCTION AND ENGINEERING DISPUTES (CONT'D)

Be an Expert in Choosing an Expert

As the tips above show, engaging an expert witness for a dispute can be a time-consuming, costly exercise which will often form a large chunk of a party's arbitration expenses. However, given the significant (or even decisive) impact an expert's evidence may have on the outcome of a dispute, it will frequently be better for a party to devote sufficient time, effort and resources to the expert process starting early on, than to take the process lightly and suffer the consequences when a dispute ends unhappily. The practices recommended above will promote an effective, efficient working relationship between parties, counsel and experts, and above all maximise a party's chances of a positive expert witness experience overall.

1 The Asian International Arbitration Centre (**AIAC**) has reported that disputes from the construction industry formed the majority of its case references for alternative dispute resolution in 2018: AIAC, *Committed to the Road Ahead: Annual Report 2018* <https://admin.aiac.world/uploads/ckupload/ckupload_20191022053544_19.pdf> accessed 7 January 2021.
2 The International Chamber of Commerce (**ICC**) has reported that disputes from both the construction/engineering and energy industries accounted for approximately 40% of its 2019 caseload: ICC, *ICC Dispute Resolution 2019 Statistics* <https://globalarbitrationnews.com/wp-content/uploads/2020/07/ICC-DR-2019-statistics.pdf> accessed 7 January 2021.
3 'Arbitration 2020 - Expert Witnesses - Legal Marketplace Analysis' (*Who's Who Legal*, 10 December 2019) <https://whoswholegal.com/analysis/arbitration-2020---expert-witnesses---legal-marketplace-analysis> accessed 7 January 2021.
4 [2013] EWHC 2872 (Comm), [2013] All ER (D) 206.
5 ibid, [28].
6 [2020] EWHC 809 (TCC).
7 Karen Mills, 'Cultural Differences & Ethnic Bias in International Dispute Resolution: An Arbitrator / Mediator's Perspective' (2008) TDM 4 <https://www.transnational-dispute-management.com/article.asp?key=1291> accessed 7 January 2021.
8 Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (OUP 2010, 2nd edn) 503.
9 Experts are often required to include a declaration of independence in their expert report to reaffirm their commitment to remaining independent.
10 The Honourable Justice Mary Anne Sanderson, 'The Top 10 'Do's and Don'ts' of Expert Evidence: A view from the Bench' at PIA Law Practical Strategies for Experts: Testifying Without Fear, 20 October 2016.

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LH AG ADVOCATES AND SOLICITORS

REINSTATING SECTION 42 OF THE ARBITRATION ACT 2005: A DESIRABLE WAY FORWARD FOR MALAYSIA

BY SOH ZHEN NING

The Malaysian Bar Council recently proposed the reinstatement of a 'modified' section 42 of the Arbitration Act 2005 (**AA 2005**) for reviewing domestic arbitral awards on questions of law.[1] This article examines the desirability of reintroducing section 42 of the AA 2005, and postulates that a restrictive right to appeal against aberrant domestic awards which contain errors of law should be viewed as beneficial for the development of arbitration law in Malaysia.

A. Introduction

In Malaysia, parties to an arbitration currently have no right to challenge an award which contains an error of law. The former section 42 provided the right to refer to the courts '*any question of law arising out of an award*'. Parliament repealed section 42 in 2018 with the stated objective of promoting Malaysia as an arbitration-friendly jurisdiction.[2]

In the two years since, the absence of any supervision at all by the Malaysian courts over the legal merits of domestic arbitral awards has raised widespread concern within the arbitral community.[3] Effectively, a perverse domestic award replete with glaring errors of law is beyond challenge or review.

The Malaysian Bar Council's proposal is to reincarnate Section 42 in a modified form. Similar to the position adopted by many other common law jurisdictions,[4] 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 (**Leave Requirement**).

The proposal presents an opportunity for Parliament, should it wish to do so, to fix the overcompensation that resulted from the wholesale abolition of the former section 42. This article argues that the Bar Council's proposal should be seriously considered by Parliament and form an essential component of any reincarnation of section 42 that may be passed.

A. Justifications for Reinstating Section 42

Parliament repealed the former section 42 with the stated objective of upholding two policies underpinning the AA 2005:

i. **Arbitration's promise of finality:** The shared understanding of parties in an arbitration is that an award puts a definitive end to the parties' dispute. The pre-eminence of finality is anchored on the view that '*if you refer a matter expressly to the arbitrator and he makes an error of law you must take the consequences … if you choose to go to Caesar, you must take Caesar's judgment…*'[5]

ii. **Minimal court intervention:**[6] In line with the AA 2005's spirit of minimal court intervention, as modelled on the UNCITRAL Model Law 2006, the Malaysian courts' power to intervene in matters involving arbitration is restricted to an extremely limited list of exceptional circumstances.[7]

Absent the former section 42, arbitral awards can be challenged in Malaysia only under section 37 of the AA 2005, for procedural irregularities or on public policy grounds (such as '*a breach of the rules of natural justice*').

Nevertheless, while finality and minimal court intervention are certainly valuable in arbitration, the existence of an avenue to appeal against an aberrant award is arguably even more imperative to instil confidence that domestic arbitrations in Malaysia are adequately supervised and safeguarded by courts of law.[8]

As succinctly explained by Jeffrey Tan FCJ in *Thai-Lao Lignite Co Ltd v Government of the Lao People's Democratic Republic*,[9] arbitration will lose its attractiveness if the courts' power is solely to rubber stamp awards:

'*If an arbitral award is a sacred cow and cannot be disturbed, that will not engender confidence in arbitration. "No disturbance" may appear, at least superficially, to support arbitrators. But in truth, "no disturbance" is anathema to arbitration… For arbitration to continue to be relevant, it must be accepted*

that arbitral awards are not sacrosanct…'

This article posits that the reinstatement of a modified section 42, with the introduction of the Leave Requirement, would be desirable for three reasons: fairness, development of the common law, and the unlikelihood that reinstatement would reduce Malaysia's appeal as an arbitral seat.

(a) Fairness Over Finality

Firstly, to recall, the rationale for arbitral finality is that parties have committed to the final determination of disputes through arbitration, such that the courts should have limited or no power to review an arbitral award. While this might perhaps be easily justifiable for errors of law that are minor or reasonably open to debate, fairness arguably demands greater scrutiny of awards containing egregious errors.

Without section 42, an aberrant award laden with serious of errors of law will forever remain uncorrected. Arbitrators are not infallible and the disputes referred to arbitration are frequently complex and of high value. Critically, the more complex[10] a dispute, the more susceptible it is to potential errors; likewise, the higher the value of a dispute, the more costly the error may be for the aggrieved party.[11]

A right to appeal would allow for substantial errors of law in arbitral awards to be rectified. This was what happened in two English cases in 2019 where a right to appeal was granted.[12] While arbitral finality dictates that the courts should not approach awards with a '*meticulous legal eye, endeavouring to pick holes, inconsistencies and faults*',[13] the presence of section 42 would ensure that the ultimate determination of disputes between parties to an arbitration does not depart too severely from substantive fairness and the integrity of the law.

(b) Development of Common Law

Secondly, the reinstatement of section 42 would benefit the continued development of case law in Malaysia. Lord Thomas of Cwmgiedd famously advocated for a more flexible test for permission to appeal on a point of law, for the reason that '*the bringing of claims in arbitration has played a central role in this development* [of the common law] *because it provided a ready source of appellate decisions, which have helped shape commercial law*'.[14]

For instance, in *Glencore International AG*,[15] the courts provided concise guidance on the interpretation of the phrase 'all disputes arising under the contract' ubiquitous in commercial contracts. This clarification was important for litigants, disputants, and the general public, because it instilled a degree of certainty about the meaning of this common phrase which the law previously lacked. It was the availability of an avenue to appeal to the courts on a question of law that enabled the English courts to provide this clarification.

The reintroduction of section 42 would allow arbitration to continue contributing important legal principles and rules to Malaysia's body of common law, not only on arbitral procedure, but on complex questions of commercial law of public importance.

(c) Malaysia Will Remain a Safe Seat

Thirdly, the former section 42 was repealed supposedly to protect Malaysia's attractiveness as an arbitral seat of choice. This stemmed from concerns that the Federal in Court in *Far East Holdings*[16] had broadened the supervisory jurisdiction of the courts over arbitral awards excessively through its expansive interpretation of section 42. This, it was felt, would undermine Malaysia as a safe seat.

However, research has indicated that the right of appeal against arbitral awards has little correlation, if any, to the popularity of a seat.[17] Rather, the attractiveness of a seat is tied mainly to parties' confidence in the legal system, with the general reputation of the seat and the impartiality of the domestic legal system the two leading factors.[18]

In addressing the possible repercussions of *Far East Holdings* through the removal of section 42, has Parliament overreacted and swung the pendulum too far? A better way to address fears of Malaysia losing its attractiveness as an arbitration-friendly jurisdiction might perhaps have been, with respect, for the courts to interpret the scope section 42 with more precision and caution than in *Far East Holdings*, as opposed to a complete removal of the right to appeal against arbitral awards.

It is also crucial to remember that even when the previous section 42 was in force, the right to appeal against an arbitral award was not mandatory. In line with the far greater importance of non-interference in international arbitrations, the default position was that the previous section 42 applied to domestic but not international arbitrations. In line also with the importance of choice in arbitration, however, parties to either category of arbitration could expressly agree

to opt in or opt out of section 42. If this choice is retained, the reintroduction of section 42 would in fact increase Malaysia's attractiveness as a seat for parties who want a right to challenge, and cause no detriment for parties who do not and would be able to opt out if necessary.

C. The Leave Requirement: A Balancing Act between Finality and Fairness

While the Bar Council's proposal included the idea of the Leave Requirement, it did not specify exactly where the threshold for obtaining leave should lie. A significant challenge in reinstating section 42 is how this threshold should be set so as to balance two principles pulling in opposite directions:

> '*… the high principle which demands* ***justice*** *though the heavens fall, and the low principle which demands that there should be an* ***end to litigation*** **[finality]** *…*' [19]

Some level of restriction on the right to appeal is therefore essential to striking an appropriate balance between, on the one hand, preventing excessive interference with the finality of awards and, on the other, retaining judicial supervision over arbitration.

The Leave Requirement, if it comes to mirror the positions adopted in the UK,[20] Singapore[21] and Hong Kong[22], should be capable of achieving this balance by permitting judicial intervention where justified by the circumstances. In these other major arbitral jurisdictions, leave is granted only if the courts are satisfied that the question of law substantially affects the rights of more than one party, and the award is 'obviously wrong' or 'open to serious doubt'.

It will be interesting to observe how Parliament introduces the Leave Requirement, if it takes up the gauntlet of reinstating a modified section 42. The modifications should enable the Leave Requirement to filter out frivolous challenges and ensure that only awards which are manifestly wrong or unjust can reach the full stage of review.[23]

D. Refining 'Question of Law'

Even if section 42 is to be reinstated with the additional Leave Requirement, another significant challenge for Parliament remains in how to determine what constitutes a 'question of law'.

Unlike in other arbitral jurisdictions,[24] the former section 42 did not statutorily define the term 'question of law'. This resulted in Malaysian courts having a broad discretion to interpret the scope of matters which fell within the section.

In ***Far East Holdings***, the Federal Court held that '*any question of law*' was wide enough to cover any point of law in controversy, irrespective of whether the legal issue was one which the arbitral tribunal was asked to determine.[25] This aspect of the judgment was seen as controversial, particularly because it would threaten the finality of awards and be deleterious to the policy of minimal court intervention.

If Parliament reinstates section 42, the arbitral community will watch eagerly with anticipation to see whether Parliament propounds a clear and comprehensive statutory definition of a 'question of law', or continues to leave interpretation of the term to the discretion of the Malaysian courts.

E. Conclusion

The Bar Council's proposal is a step in the right direction towards addressing the possible repercussions of Malaysia not granting arbitral parties any recourse against serious errors of law in an arbitral award. So long as the availability of such challenges remains optional, reintroducing section 42 should promote the substantive fairness of arbitral awards and the development of the common law in Malaysia, without any detriment to Malaysia's appeal as an arbitral seat. However, while the proposed introduction of the Leave Requirement looks promising, the ultimate success of a reinstated section 42 overall will hinge on where exactly the threshold for the Leave Requirement is set (if it is statutorily set at all), and whether and how a 'question of law' might be statutorily defined.

1 Bar Council's Circular No 248/2020 dated 5 August 2020 <https://www.malaysianbar.org.my/cms/upload_files/document/Circular%20No%20248-2020.pdf> accessed 26 December 2020.

2 Explanatory statement to Arbitration (Amendment) (No 2) Bill DR 5/2018.

3 ''Aye" for Court Control on Arbitration' (12 February 2020) <https://www.dailyexpress.com.my/news/147191/aye-for-court-control-on-arbitration/> accessed 26 December 2020.

4 See the UK's Arbitration Act 1996, s 69; Singapore's Arbitration Act 2001, s 49; Australia's Commercial Arbitration Act 2010, s 34A; New Zealand's Arbitration Act 1996, sch 2, cl 5.

5 *African & Eastern (Malaya) Ltd v White, Palmer & Co Ltd* (1930) 36 Ll L REP 113, per Scruton LJ at 462, cited by Malaysia's Court of Appeal in *Dato' Teong Teck Kim & Ors v Dato' Teong Teck Leng* [1996] 2 CLJ 249 (CA).

6 AA 2005, s 8: '*No court shall intervene in matters governed by this Act, expect where so provided in this Act*'.

7 For example, (1) appointment of arbitrators where the director of the AIAC fails to do so within 30 days from the request; (2) determination of any challenge made by a party to the appointment of an arbitrator; (3) determination of the jurisdiction of the arbitral tribunal upon an appeal by a party; (4) power to issue interim measures in relation to arbitration proceedings.

8 The Hon Justice Clyde Croft, 'Judicial Intervention in the Asia-Pacific Region' (November 2013), <https://www.supremecourt.vic.gov.au/about-the-court/speeches/judicial-intervention-in-the-asia-pacific-region> accessed 26 December 2020.

9 [2017] 9 CLJ 273; [2017] MLJU 1196.

10 William H Knull and Noah D Rubins, 'Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?' (2000) 11(4) The American Review of International Arbitration 531. This article explained that in high-stakes arbitrations with complex factual and legal scenarios, there is a market for an appellate process.

11 Tonderai Nyandoro, Why the English Right to Appeal an Arbitral Award on a Point of Law is not Anachronistic? (30 May 2016) <http://arbitrationblog.kluwerarbitration.com/2016/05/30/english-right-appeal-arbitral-award-point-law-not-anachronistic/> accessed 26 December 2020.

12 In *Nobiskrug Gmbh v Valla Yachts Limited* [2019] EWHC 1219 (Comm), the arbitral tribunal determined that the applicant was obliged to make payments to the buyer under a sale contract. The English High Court found this determination to have been wrong. In *Silverburn Shipping (IoM) Ltd v Ark Shipping Company LLC* [2019] EWHC 376 (Comm), the English High Court held that an arbitral tribunal had erred in its classification of an obligation in a shipping contract.

13 *Zermalt Holdings v NuLife Upholstery Repairs Ltd* [1985] 2 EGLR 14 (QBD Comm) per Bingham J.

14 Lord Thomas of Cwngiedd, 'Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration: The BAILII Lecture 2016', British and Irish Legal Information Institute website (9 March 2016) at 12 <https://www.bailii.org/bailii/lecture/04.pdf> accessed 26 December 2020.

15 *Glencore International AG v PT Tera Logistic Indonesia* [2016] EWHC 82 (Comm).

16 *Far East Holdings Berhad & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang* [2018] 1 MLJ 1 (FC) (***Far East Holdings***).

17 White & Case LLP & The School of International Arbitration, Queen Mary University of London, 2018 International Arbitration Survey: The Evolution of International Arbitration, website of the School of International Arbitration, Queen Mary University of London (2018).

18 ibid.

19 Robert Finch, 'London: still the cornerstone of international commercial arbitration and commercial law?' (2004) 70 Arbitration 256, 262 (emphasis added).

20 UK Arbitration Act 1996, s 69(3).

21 Singapore Arbitration Act 2001, s 49(5).

22 Hong Kong Arbitration Ordinance (Cap 609), sch 2, s 6(4).

23 Chinyere Ezeoke, 'Challenging arbitral awards on the question of law in Malaysia: is it gone for good?' (2019) 22(2) International Arbitration Law Review 56.

24 As an example, see New Zealand Arbitration Act 1996, sch 2, cl 5(10).

25 *Far East Holdings* (n 16), 152

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CASE IN POINT: THE MALAYSIAN COURTS ON ARBITRATION IN 2020

BY TEH WAI FUNG AND SOH ZHEN NING

2020 was the year that grew curiouser and curiouser, but one bastion of normalcy was the continued steady development of arbitration law in the Malaysian courts. Below, we spotlight four arbitration-related scenarios you may find yourself in, how the Malaysian courts dealt with each scenario, and how you should react to these developments in the law. We have framed our explanations based on questions we anticipate from clients, but we hope that the discussion will be of interest also to the wider legal and arbitral community. We also briefly acknowledge two judgments of the UK Supreme Court on international arbitration that may well go on to influence how the Malaysian courts approach similar issues.

A Late Award is No Award at All (*Ken Grouting Sdn Bhd v RKT Nusantara Sdn Bhd*[1])

'*My arbitrator has missed the deadline under the applicable arbitration rules to deliver his award. I would not be willing to agree with my opponent and the arbitrator to extend the deadline. Do I need to say anything now? If the arbitrator goes on to deliver his award late, will the award be valid?*'

How did the Court of Appeal answer?

If the arbitrator goes on to deliver his award late, the award will be invalid. Once the time limit for delivering the award (in the adopted arbitration rules or the arbitration agreement itself) expires, the arbitrator's mandate and jurisdiction cease. This is true even if the contract or arbitration rules allow the arbitrator to unilaterally extend time simply by notifying the parties, if the arbitrator did not exercise that power before the deadline.

You do not need to raise an objection or say anything else now. You are not under a duty to monitor the arbitrator's timelines or give the arbitrator reminders. You will not be treated as waiving the cessation of the arbitrator's mandate and jurisdiction.

Rather, the duty is on the arbitrator to meet his deadlines. If he cannot meet them, he should exhaust all procedures available to him under the arbitration agreement or rules to obtain an extension. If that fails, the arbitrator or the parties can apply to the High Court to extend the deadline under the Arbitration Act 2005 (**AA 2005**), s 46, as a last resort.

To challenge the award, you should apply to the High Court to set aside the award under the AA 2005, s 37(1)(a)(vi) on the ground that the arbitral procedure was not in accordance with the arbitration agreement between you and your opponent.

How does this affect me?

As an arbitrator, the message is simple: deliver your award on time. If you need an extension, seek one in accordance with the arbitration agreement or rules. If that fails, and you still want to deliver the award late, you will have to apply to the High Court under the AA 2005, s 46 for an extension.

As a party to or counsel in an arbitration, you are not strictly required to remind your arbitrator to deliver his award on time or to raise an objection at the time if he delivers the award late. You will still be able to apply to set aside the award under the AA 2005, s 37(1)(a)(iv) later on.

To be safe, however, it still seems more sensible for parties nevertheless to raise a written objection soon after the deadline passes, unless there is a reason not to. This increases the chances of working out a practical, workable solution out of court, instead of ending up with no valid award at the end of the arbitration. This will also put to bed any possible suggestion of waiver or estoppel if you later apply to set aside the award, in case the law changes.[2]

You should also be mindful that the position is different where a tribunal exceeds the scope of its authority,[3] such as by dealing with a dispute outside the terms of reference. If you wish to object on that ground, then you must do so as soon as the matter in question is raised during the arbitral proceedings, or risk losing the right to apply to set aside the award on that ground later on.

Arbitration Agreement Trumps Default Judgment (*Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd*[4])

'*My opponent obtained a default judgment from the court, even though we have an arbitration agreement. Can I still refer the dispute to arbitration, or am I bound by the default judgment?*'

How did the Federal Court answer?

Your opponent cannot rely on a default judgment granted by the courts to circumvent a valid arbitration agreement. The default judgment will be set aside. The essence of the AA 2005, s 10, which requires court proceedings to be stayed where parties have an arbitration agreement, is to prevent parties from being effectively 'rewarded' for breaching agreements to arbitrate.

You should make two applications to the court that granted the default judgment: first, to set aside the default judgment; second, to stay the court proceedings pending referral of the dispute to arbitration. Do not take any other steps in the court proceedings (such as filing your defence) without expressly reserving your right to apply for a stay. Otherwise, you will be unable to rely on the AA 2005, s 10.[5]

In considering your application for a stay under section 10, the court will look first at whether there is in fact a valid arbitration agreement in respect of the dispute, that is not null, void, inoperative or incapable of being performed. As a section 10 application is a jurisdictional issue, the court must consider your application before deciding any other issues. The court will not examine the merits of the dispute, or whether the dispute even exists.

How does this affect me?

This decision demonstrates the Malaysian courts' arbitration-friendly policy and commitment to upholding parties' agreements to arbitrate.

If your contract contains a valid arbitration agreement, and you have failed to respond to lawsuits filed against you in court on time or at all, then this decision should be encouraging. Nevertheless, in practice, it is almost always better to respond to any litigation threat

promptly and in the correct way – in this scenario, by applying to stay the court proceedings brought against you. Failure to do so may result in you having to spend unnecessary time and expense on not only applying to stay proceedings, but also to set aside the default judgment.

Anti-Arbitration Injunctions, Again (*Felda Investment Sdn Bhd v Synergy Promenade Sdn Bhd*[6] (Suit A) and *Federal Land Development Authority v Tan Sri Haji Mohd Isa & Ors*[7] (Suit B))

'Can I stop an arbitration and take my dispute to court instead if I have an arbitration agreement? Is the position different if (I believe) I am not a party to the arbitration agreement?'

How did the High Court answer?

To stop an arbitration, you will have to apply to court for an anti-arbitration injunction to restrain your opponent from continuing the arbitration. The threshold you must meet to get the injunction is higher if you are a party to the arbitration agreement.

If you are a party to the arbitration agreement, you must prove that the continuance of the arbitration would be '*oppressive, vexatious, unconscionable or an abuse of process*'.

If you are obviously not a party to the arbitration agreement, you must satisfy the three-stage test for interim injunctions generally from the classic case of *American Cyanamid*:[8] (1) there are serious issues to be tried, (2) the balance of convenience lies in favour of granting the injunction, and (3) damages would not be an adequate remedy.

If you are disputing the validity of the arbitration agreement because you say the overall agreement containing it is for some reason null and void (for example, because of illegality or fraud), then the courts will nevertheless separate the arbitration clause as a surviving, independent agreement. The courts will thus treat you as if you are a party to an arbitration agreement.

How does this affect me?

If you are a **non-party** to an arbitration agreement seeking to restrain an arbitration, then, while the threshold is lower for you, it is not a given that you will be granted an injunction. The High Court in Suit B referred to only the general *American Cyanamid* three-stage test for injunctions. However, the earlier decision of the Federal Court in *Jaya Sudhir*[9] remains good law, so you will additionally have to establish that the grant of the injunction would not result in '*any party suffering a severe disadvantage*', and that

'*the benefits … outweigh the* [dis]*advantage*'.[10]

If you are a **party** to an arbitration agreement, or if **prima facie** you are a party, then you face even more of an uphill battle because of the significantly higher threshold.

It is therefore crucial that companies implement and enforce strict, rigorous internal approval procedures for the agreement and execution of contracts, and that the consequences of agreeing to an arbitration clause are impressed upon all company officers who may be involved in executing contracts. This is to avoid being bound by arbitration clauses that will be upheld in otherwise improperly concluded contracts.

This last point is best demonstrated by the unique facts of these the two High Court cases. A central issue was whether the overall agreement containing the arbitration clause had been executed by Felda Investment Corporation (**FIC**), as the subsidiary of Federal Land Development Authority (**FELDA**), with the required statutory approval. The argument was that if the overall agreement was invalid, then FIC would be party to neither the overall agreement nor the arbitration agreement, and the lower threshold for non-parties would apply. The High Court applied the higher threshold for parties because, despite its arguments about invalidity of the overall agreement, FIC was prima facie a party to the severable arbitration clause. Although the High Court granted the anti-arbitration injunction in Suit B, that was because of the peculiarities of the arbitration clause, not FIC's argument that the agreement was invalid.

Not Our Facts (*Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd*[11] and *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd*[12]) (see also Dato' Nitin Nadkarni and Teh Wai Fung, 'Not Our Facts: How Far Can an Arbitrator Look Beyond Parties' Evidence?' [2020] 5 MLJ xlv)

'*The arbitrator's award refers to information and decides issues that neither my opponent nor I referred to during the arbitration. The arbitrator did not mention these at any time until the award. The award went against me. Can I challenge the award?*'

The Federal Court addressed this issue in two cases. The reasoning in the two cases is slightly different, so we summarise each in turn.

How did the Federal Court in Master Mulia answer?

You can apply to the High Court to set aside the award for a breach of the rules of natural justice during the proceedings or in connection with the making of the award, under the AA 2005, s 37(2)(b). You will need to succeed at two stages.

First, you must show (1) which rule of natural justice the arbitrator breached, (2) how it has been breached, and (3) how the breach was connected to the making of the award. Because this first stage is a minimum threshold, it operates fairly rigidly. An example of a rule of natural justice is the arbitrator's obligation to inform parties of extraneous evidence that the arbitrator might rely on, and to give both you and your opponent the opportunity to state your respective cases on that evidence. A breach of this rule will be connected to the making of the award if the arbitrator does not do so and goes on to rely on that evidence in his award.

After you pass the minimum threshold, you must also persuade the High Court to exercise its discretion to set aside the award. A discretion is more flexible than a minimum threshold because it allows the Court to evaluate factors in terms of degree, rather than as an inflexible binary choice (to weigh up 'shades of grey', rather than choose between only 'black or white'). For example, the Court will be less likely to set aside an award if the breach is not very serious. There are several factors that affect this discretion, although it is not totally clear how exactly they fit together. We interpret the Federal Court's judgment as follows (table overleaf):[13]

Seriousness of Breach	Significance of Breach	Effect of Breach on Outcome (Causation/Materiality)	Discretion to Set Aside
Immaterial	No need to investigate	Not likely to have affected	Refused
Serious	Not significant	No real impact, would have reached same conclusion	May be refused
Serious	Significant	Might have affected outcome	May be set aside
Serious	'Great', that is, very significant	No need to investigate	Practically automatically set aside

Importantly, at no point do you need to show that the award has caused you harm or 'prejudice'.

In *Master Mulia* itself, the dispute was whether alleged negligence by a charterer had caused damage to an owner's vessel. This turned heavily on how the damage had been caused. As the extraneous evidence was on this central issue of causation, the Federal Court set aside the award.

How did the Federal Court in Pancaran Prima answer?

Again, you can apply to set aside the award for a breach of the rules of natural justice, under the AA 2005, s 37(2)(b). You will have to show that you or your opponent could not reasonably have foreseen the opinions, ideas or reasoning that the arbitrator adopted that you are challenging, in that they caused you or your opponent 'significant surprise'.

As well as a breach of the rules of natural justice, the Federal Court also considered whether the same aspects of the award might be challenged as errors of law under the former AA 2005, s 42. Section 42 was repealed in 2018 but featured in this case because the award was published commenced before then.[14] As it remains repealed for now,[15] you can take the discussion on section 42 simply as a reminder that it is almost impossible to challenge an arbitrator's findings of fact in court.

In *Pancaran Prima* itself, a subcontractor sought loss of profit at a margin of 25%. The main contractor suggested no more than nominal damages because the subcontractor had not proven its supposed profit margin of 25%. The arbitrator ultimately awarded 10% and 7.5% profit margins for different parts of the subcontract. This was based on the arbitrator's own experience that a 10%-15% margin for 'profit and attendance' to manage a 'nominated subcontractor' was a norm in the Malaysian construction industry. The Federal Court found this to be 'reasonably foreseeable' by the parties, even though both had submitted on 'loss of profit' for an appointed subcontractor and not 'profit and attendance' for a nominated subcontractor.

How does this affect me?

Whatever your role in an arbitration, it is probably best to treat these cases as delineating the outermost limits of permissibility for an arbitrator. Taking a conservative approach and staying well within the lines, in the ways we explain below, will minimise the risk of an award being challenged, and the inconvenience and expense that accompany a challenge.

For arbitrators, make sure you put any ideas, expertise or personal experience outside parties' pleadings and evidence to the parties and provide an opportunity to respond before including them in your award, unless you are certain that they are reasonably foreseeable to the parties. Although the threshold for reasonable foreseeability seems very low, doing so will eliminate any possibility that you have crossed the limit, lest your award be set aside.

For counsel, because there is a low threshold for reasonable foreseeability, you may wish to expand your pleadings and evidence even further to cover everything under the sun, even if only minimally relevant.

For commercial parties, make sure you select your arbitrators carefully, especially those with particular expertise. When you appoint such an arbitrator, you effectively accept the risk that the arbitrator may rely on material or ideas of his own without notifying you first. Your counsel may be more cautious and expansive in his or her approach, which may increase the costs for you of the arbitration.

While the two cases were heard together because of the substantial similarities between their issues, the Federal Court's two judgments were not cross-referred or explicitly reconciled. It will be interesting to see how courts apply the two judgments in the future.

Casting a Glance at the UK Supreme Court

The Malaysian courts have certainly not been alone in being kept busy with important questions of arbitration law. Judgments of the courts of one common law jurisdiction frequently influence the development of case law in others – either by wholesale adoption or to draw a contrast – perhaps none more so than the UK Supreme Court (**UKSC**). It is therefore always valuable to keep an eye on developments there.

In two keenly anticipated judgments in 2020, the UKSC examined the proper approach to determine the governing law of an arbitration agreement, and how an arbitrator appointed in multiple related arbitrations should resolve the tension between the confidentiality of one arbitration and his duties of impartiality and disclosure in another. As the judgments are lengthy, extensive and intricate, we distil below only their absolute essentials.

Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb[16]

In an international commercial contract which contains an arbitration agreement, three systems of national law will usually be engaged when a dispute arises: (1) the law governing the contract, (2) the law governing the arbitral process (seat), and (3) the law governing the arbitration agreement.

This UKSC decision is especially relevant if your contract has an international element. Ideally, you will have expressly agreed which country's law applies to each of the three items mentioned above. What happens if your contract does not specify the governing law of your arbitration agreement, and the governing law of your contract differs from the law of the seat of the arbitration? This is important because the governing law of your arbitration agreement may affect how it is interpreted, and even whether it is valid.

This issue has long divided courts and commentators, in the UK and internationally. Here, the UKSC succinctly explained how this question is to be answered in three different situations (tabulated overleaf):

Governing Law Specified?			Governing Law of the Arbitration Agreement
Overall Contract	Seat	Arbitration Agreement	
N/A	N/A	Yes	As specified in the arbitration agreement.
Yes	Yes, different to overall contract	No	Courts will apply the rules of contractual interpretation to construe the arbitration agreement and the contract containing the arbitration agreement, as a whole. Generally (not always), the law governing the main contract will govern the arbitration agreement.
No	Yes	No	The contract and the arbitration agreement will each be governed by the law of the place with which they are most closely connected. In many cases (not always), the arbitration agreement is most closely connected to the seat of the arbitration agreement.

Halliburton Co v Chubb Bermuda Insurance Ltd[17]

You should take note of this case if you have been approached by a party to act as arbitrator in multiple arbitrations involving the same or overlapping subject matter, and that party is the only common party to the arbitrations – or if you are the common party seeking to make such an appointment.

An arbitrator's duties include the duty of impartiality. An arbitrator will fail in this duty if an 'objective observer' who is 'fair-minded and informed' of the facts would find a 'real possibility' of bias, which bias can be actual or apparent. To fulfil this duty, the arbitrator must disclose to parties matters that could arguably be said to give rise to such a possibility.

At the same time, an arbitrator also has obligations to uphold the privacy and confidentiality of an arbitration. This means that the arbitrator can disclose information in one arbitration (**Arbitration A**) to parties in another (**Arbitration B**) only if the parties to Arbitration A 'consent' to the disclosure. In certain fields (such as 'Bermuda Form', maritime and sports arbitrations), the practice of multiple appointments is so common that consent can sometimes be inferred from the custom and practice of that field.

To fulfil both duties, an arbitrator must disclose, and disclose no more than, (1) the identity of the common party seeking to make the appointment or nomination, (2) the capacity in which his appointment was sought (for example, party-appointed or court-nominated), and (3) a statement that Arbitration B arises out of the same subject matter (including perhaps a high-level statement on whether it involves similar issues). The common party's consent to such limited disclosure can be inferred. Whether an arbitrator who does accept such multiple appointments can nevertheless be removed for bias depends on the particular circumstances of each individual case.

What to Look Out For in 2021

The legal and arbitral communities have many reasons to be excited about 2021. The Bar Council has recently proposed the revival with modifications of the repealed section 42 of the AA 2005 – which allowed arbitral awards to be challenged for errors of law. This raises questions not only about how section 42 may be reworked, but also whether case law on the previous section 42 will retain any relevance. As for section 37, it will be interesting to see how the courts will apply the fact-sensitive tests in *Master Mulia* and *Pancaran Prima* if faced again with the question of whether an arbitrator is entitled to rely on extraneous material in an arbitration. Internationally, with third-party arbitration and litigation funding increasingly popular and recognised, it may not be long before Malaysia too takes its first steps towards legalising the practice locally. The next twelve months will tell how far these potential developments come to fruition.

CASE IN POINT: THE MALAYSIAN COURTS ON ARBITRATION IN 2020

1 [2020] MLJU 1901 (CA).
2 The Court of Appeal's decision in *Ken Grouting* that a deadline to deliver an award cannot be waived came merely six months after a High Court decision in another case to the opposite effect: *Sunway Creative Stones Sdn Bhd v Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd* [2020] MLJU 658 (HC). As it seems that this area of law may be in a state of some flux, it will not be surprising if the Court of Appeal or even the Federal Court reverses the position again in a future case, and dismisses an application based on waiver and/or estoppel.
3 The Court of Appeal in *Ken Grouting* held that an arbitrator's *jurisdiction*, *mandate* and *authority* – matters which might seem to fall within the AA 2005, s 18(5) – cease upon expiry of the deadline for delivery of the award. However, the Court distinguished award deadlines on the ground that, because s 46 specifically governs applications to extend them, s 18(5) does not apply.
4 [2020] 3 MLJ 545 (FC).
5 See also *Kejuruteraan Sinar Selaseh Sdn Bhd v Global Built Sdn Bhd* [2020] 11 MLJ 442 (HC).
6 [2020] MLJU 1465 (HC).
7 [2020] MLJU 1586 (HC); [2020] MLJU 1587 (HC).
8 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (UKHL); *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 (CA).
9 *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1 (FC).
10 ibid, [69] reads '*the benefits must outweigh the advantage*', but this must surely be a typographical error.
11 [2020] 12 MLJ 198 (FC).
12 [2021] 1 MLJ 1 (FC).
13 Table from Dato' Nitin Nadkarni and Teh Wai Fung, 'Not Our Facts: How Far Can an Arbitrator Look Beyond Parties' Evidence?' [2020] 5 MLJ xlv.
14 *AMDAC (M) Sdn Bhd v BYD Auto Industry Co Ltd* [2020] 11 MLJ 281 (HC).
15 But may be revived: see Soh Zhen Ning, 'Reinstating Section 42 of the Arbitration Act 2005: A Desirable Way Forward for Malaysia'.
16 [2020] UKSC 38.
17 [2020] UKSC 48.

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