Malaysian Arbitration & Maritime Law

Christopher & Lee Ong, *Member of Rajah & Tann Asia Network*
Jainil Bhandari, *Partner, Shipping & International Trade*
Sivaram Prasad, *Senior Associate*
Derrick Leong, *Senior Associate*

Introduction

Recent years have seen a rapid increase in the use of arbitration in Malaysia as the preferred means to resolve disputes arising under commercial contracts. Various stakeholders have actively promoted Malaysia as an arbitration friendly seat with the presence of established arbitration institutions, an efficient and pro-arbitration judiciary, and experienced arbitrators located in the region.

This article provides a brief overview of Malaysian arbitration and maritime law. It also outlines the procedure for the recognition and enforcement of foreign arbitral awards in Malaysia (including SCMA Awards) and the growing body of relevant case law that has emerged from the Malaysian Courts recently.

Overview of Malaysian Arbitration Law

The Arbitration Act 2005 ("**Act**") provides the legal framework for both domestic and international arbitration in Malaysia. It closely adopts the UNCITRAL Model Law on International Commercial Arbitration 1985 ("**UNCITRAL Model Law**"). The Act was substantially amended in 2018 to follow the latest revision of the UNCITRAL Model Law.[1] The procedure for Court proceedings relating to arbitration, such as applications for interim relief, or for the enforcement of an arbitration award, are contained in Order 69 of the Rules of Court 2012 ("**ROC**").

The Act provides that any dispute which the parties have agreed to refer to arbitration is arbitrable unless the arbitration agreement is contrary to public policy, or the subject matter of the dispute is not capable of settlement by arbitration under Malaysian law.[2] Such non arbitrable disputes include family and inheritance matters, company insolvency and winding up, and criminal offences. The Court has the power to look at the subject matter of the dispute in deciding on arbitrability.[3]

An "international arbitration" is defined widely to include arbitrations where either one of the parties to the arbitration agreement has its place of business outside Malaysia, or where the seat of the arbitration, or place where a substantial part of the obligations of any commercial or other relationship is to be performed outside Malaysia.[4]

An arbitration agreement must be in writing although its content may be recorded in any form, including by any electronic communication.[5]

The Act explicitly defines the parameters of the Court's powers to interfere in the arbitral process and provides that no Court shall intervene in matters governed by the Act, except where so provided in the Act.[6] In interpreting the provisions of the Act, the Malaysian Courts have consistently adopted a pro-arbitration approach by emphasising the finality of the award and minimal curial intervention in international arbitration.[7] Thus, although the Court has wide powers to grant interim reliefs for an arbitration (including for arbitrations seated outside of Malaysia) such as orders for the arrest of property pursuant to the admiralty jurisdiction of the High Court, preservation and sale of property and for interim injunctions or measures (including freezing injunctions), such powers are limited to supporting the arbitral proceedings and the Court will not usurp the role and functions of the arbitral tribunal.

The Act provides for a mandatory stay of any court proceedings brought in breach of an arbitration agreement, unless the agreement is null and void, inoperative or

incapable of being performed.[8] Where admiralty proceedings are stayed on the application of a party because the matter is the subject of an arbitration agreement, the court in granting the stay may order that the property arrested be retained as security for the satisfaction of any award given in the arbitration, or order that the stay of the proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.[9]

Judicial intervention in an arbitration award is also strictly limited to the specific statutory grounds stated in the Act which relate the tribunal's jurisdiction, irregularities in the arbitral process, fraud and breaches of public policy. These grounds are considered further below.

Overview of Maritime Law in Malaysia

The development of maritime law in Malaysia has been aided by the establishment in 2010 of the Admiralty Court which is a specialist Court within the Commercial Division of the Kuala Lumpur High Court where admiralty or *in rem* proceedings are determined by specialist Judges who are typically more conversant with the legal issues and industry norms.

The High Court has the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981.[10] Thus, the High Court's admiralty jurisdiction extends to most claims of a "maritime" nature relating to ships including claims for possession or ownership of a ship, enforcement of a ship mortgage, damage received or done by a ship, cargo loss or damage, breach of agreements for the hire of a ship, salvage, crew wages, ship building and repair claims, and disbursements incurred in the operation and maintenance of a ship.[11]

Malaysian law recognizes the creation of a maritime lien for a limited class of admiralty claims as under English law,[12] and such claims are not defeated by a change of ownership of the vessel.[13] The issuance of a valid i*n rem* writ also creates a statutory lien for the claim which survives a change of ownership.

The admiralty jurisdiction of the Court is invoked by the service of an *in rem* writ on or arrest of the ship. A warrant of arrest issued out of the Admiralty Court is effective for execution in any port located in West Malaysia notwithstanding that the vessel is outside port limits; but provided that the vessel is ascertained to be within Malaysian territorial waters at the time of execution.[14]

The Admiralty Court recently clarified in *Premium Vegetable Oils Sdn Bhd v The Owners and/or Demise Charterers of The Ship or Vessel "Ever Concord*"[15] that the amendments to Order 70 Rule 4 of the ROC provide that the arrest warrant is issued by the Court as of right provided that the formal requirements for the arrest prescribed under the ROC have been satisfied. Hence, the arresting party is no longer required to make full and frank disclosure of all material facts in its affidavit when applying for the arrest warrant.

Enforceability of Foreign Awards

Malaysia is a party to the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 ("**New York Convention**"). The Act provides that on an application to the High Court, an award from a State which is party to the New York Convention shall, subject to the relevant requirements be recognised as binding and enforced by entry as a judgment in terms of the award.[16] The applicant must produce a duly authenticated original award and original arbitration agreement or certified copies of the same.[17] Where the award or arbitration agreement is in a language other than the national language or English, an English translation certified as correct by a sworn translator or by an official of a diplomatic or Consular agent of the country in which the award was made must be provided.[18]

The recent Federal Court case of *Siemens Industry Software GmbH & Co KG (Germany) v Jacob and Toralf Consulting Sdn Bhd & Ors*[19] clarified that only the

dispositive portion of the award needs be exhibited and registered for enforcement and not the reasoning or findings of the tribunal, for to register the entire award would undermine the confidentiality of the arbitration proceedings which is a cornerstone of arbitration.

Partial or interim awards may also be recognized and enforced, but not interlocutory orders.[20] The tribunal is also empowered to issue interim measures in the form of an arbitral award.[21]

The respondent may apply to set aside an order for enforcement within 14 days of service of the order. The award shall not be enforced until the expiration of that period, or if the respondent applies within that period to set aside the award, until after the application has been finally disposed.[22]

Section 39 of the Act sets out the grounds on which recognition of the award (and consequently enforcement) may be refused. These mirror Article 36 of the UNCITRAL Model Law and are similar to the grounds under Section 37 of the Act for setting aside an award. In short, a party seeking to resist recognition (and enforcement) must show either that:

- A party to the arbitration agreement was under an incapacity;[23]
- The arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the state in which the award was made;[24]
- The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;[25]
- The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;[26]
- The award contains decisions on matters beyond the scope of the submission to arbitration;[27]
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties (unless such agreement was in conflict with a provision of the Act from which the parties cannot derogate), or, failing such agreement, was not in accordance with the Act;[28] or
- The award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.[29]

An award may also have its recognition or enforcement refused if it is in conflict with the public policy of Malaysia or if the subject matter of the dispute is not arbitrable under Malaysian law.[30] The Act provides that an award is in conflict with public policy where the making of the award was induced or affected by fraud or corruption, or a breach of the rules of natural justice (which comprises the twin pillars of the rule against bias and the right to be heard)[31] has occurred during the arbitral proceedings or in connection with the making of the award.[32]

The Malaysian Courts have also defined public policy narrowly, where in *Jan De Nul (Malaysia) Sdn Bhd v. Vincent Tan Chee Yioun*[33] the Federal Court held that a conflict of public policy only arises where the upholding of an award would shock the conscience or is clearly injurious to the public good or violates the basic notions of morality and justice. These statutory grounds for setting aside or refusing enforcement of the award are exhaustive. There is no appeal on the merits of the award and errors of fact and law are final and binding on the parties.[34]

Institutional vs Ad Hoc Arbitration

There is no requirement in the Act for an arbitration to be administered by any institution. Malaysian law also does not distinguish between an institutional and an ad hoc arbitration award. An award is enforceable as long as there is a valid arbitration agreement and the requirements for enforceability under the Act have been satisfied.

That said, most commercial parties prefer to opt for institutional arbitration because of the advantages of a ready procedural framework and administrative support. The leading arbitral institution is the Asian International Arbitration Center (AIAC). Additionally various trade and industry bodies such as the Palm Oil Refiners Association of Malaysia (PORAM) and the Malaysian Institute of Architects (*Pertubuhan Arkitek Malaysia* or PAM) routinely conduct arbitrations under their respective rules of procedure.

Status of SCMA Awards in Malaysia

SCMA Awards have been upheld in Malaysia[35] and would be regarded like any other foreign arbitral award subject to the same procedures for recognition and enforcement as outlined above.

Conclusion

Malaysia has progressively laid the foundations to this day in order to establish itself as a reliable and pro-arbitration seat in this region. The modern legislative framework currently in place, which is in line with international arbitration rules and best practices, coupled with the recent decisions of the courts have engendered confidence in respect of Malaysia's commitment to uphold the sanctity of the arbitral process. The stage is set for arbitration to thrive in Malaysia for years to come.

[1] Arbitration (Amendment) (No. 2) Act 2018.
[2] Section 4(1) of the Act.
[3] Section 37(1)(b)(i) of the Act.
[4] Section 2 of the Act.
[5] Sections 9(3), (4) and (4A) of the Act.
[6] Section 8 of the Act.
[7] For eg. by the Court of Appeal in Cairn Energy India Pty Ltd v The Government of India [2009] 6 MLJ 795 and most recently by the Federal Court in Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd [2020] 9 CLJ 466.
[8] Section 10(1) of the Act.
[9] Section 10(2A) of the Act.
[10] Section 24 of the Courts of Judicature Act 1964.
[11] Section 20 United Kingdom Supreme Court Act 1981.
[12] That is claims for salvage, crew wages, damage done by a ship and bottomry and respondentia.
[13] See Halsbury's Laws of Malaysia – Admiralty (Volume 1(1)) at [10.060] and [10.062].
[14] Paragraph 16 of the Practice Direction No. 2 / 2007.
[15] [2021] 9 MLJ 936.
[16] Section 38(1) of the Act.
[17] Section 38(2) of the Act and Order 69 Rule 8(3) of the ROC.
[18] Section 38(3) of the Act and Order 69 Rule 8(3) of the ROC.
[19] [2020] 5 CLJ 143.
[20] Section 2 of the Act defines an "award" as "a decision of the arbitral tribunal on the substance of the dispute and includes any final, interim or partial award and any award on costs or interest but does not include interlocutory orders".
[21] Section 19 of the Act.
[22] Order 69 Rule 8(7) of the ROC.
[23] Section 39(1)(a)(i) of the Act.
[24] Section 39(1)(a)(ii) of the Act.
[25] Section 39(1)(a)(iii) of the Act.
[26] Section 39(1)(a)(iv) of the Act.
[27] Section 39(1)(a)(v) of the Act.
[28] Section 39(1)(a)(vi) of the Act.
[29] Section 39(1)(a)(vii) of the Act.
[30] Section 39(1)(b) of the Act.
[31] See Tanjung Langsat Port Sdn Bhd v. Trafigura Pte Ltd & Another Case [2016] 4 CLJ 927.
[32] Section 37(2) of the Act.
[33] [2019] 1 CLJ 19.
[34] See for instance the Federal Court decision in Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd [2020] 9 CLJ 466 and the Court of Appeal's judgment in Tune Talk Sdn Bhd v Padda Gurtaj Singh [2019] 1 LNS 85.
[35] See the Court of Appeal decision of Sintrans Asia Services Pte Ltd v. Inai Kiara Sdn Bhd [2016] 5 CLJ 746 which concerned an SCMA Award.

Authors:

Jainil Bhandari
Partner, Shipping & International Trade
jainil.bhandari@rajahtann.com

Sivaram Prasad
Senior Associate
sivaram.prasad@christopherleeong.com

Derrick Leong
Senior Associate
derrick.leong@christopherleeong.com

RAJAH & TANN ASIA

LAWYERS WHO KNOW ASIA

Website: https://www.christopherleeong.com/

Jainil Bhandari is a partner of Rajah & Tann Singapore LLP and its Malaysian associate firm Christopher & Lee Ong which are part of the Rajah & Tann Asia network. He has been in active litigation and arbitration practice since 1989, appearing as Counsel in both the Singapore and Malaysian courts and in institutional commercial arbitrations administered under SIAC, SCMA, AIAC, LMAA and UNCITRAL Rules. He is also a Fellow of the Chartered Institute of Arbitrators and an accredited mediator.

Jainil is a Senior Accredited Specialist for Maritime and Shipping Law under the Singapore Academy of Law's Specialist Accreditation Scheme. He has considerable experience in shipping and international trade disputes including relating to bills of lading, charter parties, offshore transportation contracts and construction projects, marine insurance, shipping casualties and the sale of oil, coal, iron ore and other commodities.

Jainil has been consistently recognised as a leading lawyer in shipping law by The Asia Legal Pacific 500, Chambers Asia Pacific and Global, Asialaw Profiles and Who's Who Legal: Singapore.

Sivaram Prasad is a Senior Associate at Christopher & Lee Ong, which is a part of the Rajah & Tann Asia network of firms. He is a member of the dispute resolution and litigation team, covering a wide brief including corporate and commercial litigation, admiralty matters and employment law. He has represented clients at every level of the Malaysian Courts all the way up to the Federal Court.

Derrick Leong is a Senior Associate at Christopher & Lee Ong, which is a part of the Rajah & Tann Asia network of firms. His practice is focused around corporate and commercial litigation and he specifically advises clients on a range of Technology related issues in the course of his work. Having a native and professional proficiency in English and the national language of Malaysia, he has handled disputes at every level, ranging from the Small Claims Tribunal to the Federal Court. Derrick holds memberships at the Honourable Society of Middle Temple, the Association Internationale pour la Protection de la Propriété Intellectuelle, the Malaysian Intellectual Property Association and the Inns of Court Malaysia. He is also a regular contributor to several legal publications.

SCMA
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