



Arbitration Guide
IBA Arbitration Committee

MALAYSIA

(Updated January 2018)

Sunil Abraham
Daniel Chua

Cecil Abraham & Partners
Suite 12.01, Level 12
Menara 1MK, 1 Jalan Kiara,
Mont' Kiara,
50480 Kuala Lumpur, Malaysia.

sunil@cecilabraham.com
daniel@cecilabraham.com

TABLE OF CONTENTS

	PAGE
I. Background	3
II. Arbitration Laws.....	5
III. Arbitration Agreements	7
IV. Arbitrability and Jurisdiction	10
V. Selection of Arbitrators.....	12
VI. Interim Measures	14
VII. Disclosure/Discovery.....	16
VIII. Confidentiality.....	17
IX. Evidence and Hearings	18
X. Awards	21
XI. Costs	23
XII. Challenges to Awards	25
XIII. Recognition and Enforcement of Awards.....	26
XIV. Sovereign Immunity	28
XV. Investment Treaty Arbitration.....	29
XVI. Resources	30
XVII. Trends and Developments.....	32

I. Background

(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?

Arbitration is well-established in Malaysia and continues to gain popularity.

The principal advantages of arbitration in Malaysia are the speed of the proceedings, the prevalent usage of documents which may negate a need for long protracted oral hearings and the enforceability of awards.

Further, the specialisation and expertise of arbitrators on the technical aspects of the dispute seems to be a compelling factor for parties to opt for arbitration. The disadvantage of arbitration would be the general costs of arbitration which includes the fees of the arbitrators and the fees of the relevant arbitral institutions.

In addition, much also depends on the arbitrators appointed and the corresponding availability of such arbitrators.

(ii) Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?

Both ad hoc and institutional arbitrations are common in Malaysia.

There are a large number of ad hoc arbitrations, as the Public Works Department standard form of contract, which are used for all domestic public sector construction projects, does not provide for institutional arbitrations.

The most popular form of institutional arbitrations for domestic transactions is governed by the Kuala Lumpur Regional Centre for Arbitration ('**KLRCA**'). International transactions traditionally provide for arbitrations governed by the International Chamber of Commerce ('**ICC**') and the London Court of International Arbitration ('**LCIA**').

However, in recent times it is also common for arbitration clauses to provide for arbitrations to be governed by the Singapore International Arbitration Centre ('**SIAC**') or the Hong Kong International Arbitration Centre ('**HKIAC**').

(iii) What types of disputes are typically arbitrated?

According to the KLRCA Annual Reports from 2015 to 2017, construction disputes (including engineering, infrastructure, architecture and design, and quantity surveying) form the bulk of disputes typically arbitrated in Malaysia,

due to the use of standard forms of building contracts which incorporates arbitration clauses.

Apart from the construction industry, arbitration is frequently used to resolve disputes relating to agency (dealerships, distributions and franchising), aviation and airports, banking and financial instruments, companies (shareholders, shares and equities, joint ventures, partnerships and mergers and acquisitions), concession agreements, employment and industrial relations, energy (including mining, oil and gas, power, natural resources), information technology and telecommunications, intellectual property (copyrights, patents and trademarks), insurances and re-insurances, investment (commodities and treaty), maritime (admiralty, shipping, charter party, vessels, bills of lading and shipbuilding), media and broadcast (advertising, arts and entertainments), real estate (land and properties, tenancies and conveyancing), services and goods (sale, supply, trading and marketing) and sports.

(iv) How long do arbitral proceedings usually last in your country?

Arbitrations in Malaysia are generally determined expeditiously.

Generally, major arbitrations are completed within twelve months from the date of commencement. However, much depends on the arbitral tribunal and counsel involved.

According to the KLRCA Annual Report 2017, the average time taken to conclude arbitration proceedings under KLRCA administration is between 8 to 11.8 months. This distinguishes the KLRCA as being one of the handful of arbitral institutions which, on average, conclude an arbitration within a year.

Under the KLRCA Fast Track Rules, the average time taken to conclude arbitration proceedings is between 3.5 to 5 months.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

There are partial restrictions. Malaysian law allows nationals (including foreign lawyers who need not be members of the Malaysian Bar) to act as counsel or arbitrators in arbitration proceedings held in the state of Sabah and Sarawak. According to the Federal Court in Samsuri bin Baharuddin & 813 Ors v Mohamed Azahari bin Matiasin (and Another Appeal) [2017] 2 AMR 410, foreign lawyers including West Malaysian lawyers who are not Advocates & Solicitors of the High Court of Sabah & Sarawak are precluded from representing parties in arbitration proceedings in Sabah unless they have secured the relevant approvals which includes a work permit.

II. Arbitration Laws

- (i) **What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?**

The Arbitration Act 2005 (**'the Act'**) governs arbitrations seated in Malaysia. The Act applies for both domestic and international arbitrations, subject to certain differences: see Section II (ii) below.

- (ii) **Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?**

The main differences are:

- the default number of arbitrators where parties fail to determine the number of arbitrators is three for international arbitrations and one for domestic arbitrations (Section 12(2)(a) and (b) of the Act);
- the advisability of appointing an arbitrator of a nationality other than those of the parties is a factor to be considered by the Director of the KLRCA or the High Court, in appointing an arbitrator for international arbitrations (Section 13(8)(c) of the Act); and
- for domestic arbitrations, unless parties agree otherwise, the law applicable to determining the substance of a dispute is Malaysian law. This default position does not apply to international arbitrations (Section 30(1) and (2) of the Act).

Further, according to Section 3 of the Act, Part III of the Act can be opted-out by agreement of parties in domestic arbitrations and be opted-in by agreement of parties in international arbitrations. Part III relates to additional provisions and powers relating to arbitration granted to the parties, the tribunal and the High Court. These include:

- the power of the parties or the tribunal to consolidate proceedings or to hear disputes concurrently (Section 40 of the Act);
- the power of parties to refer a preliminary point of law for determination by the High Court (Section 41 of the Act);
- the power of parties to refer questions of law which arise out of the award

to the High Court (Section 42 of the Act);

- the power of parties to refer to the High Court for costs to be taxed (Section 44(1) of the Act);
- the power of the High Court to extend time for any party to commence arbitration proceedings if such time is limited by the arbitration agreement (Section 45 of the Act); and
- the power of the High Court to extend time for a tribunal to make an award if such time is limited by the arbitration agreement (Section 46 of the Act).

(iii) What international treaties relating to arbitration have been adopted (eg New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

Malaysia is a signatory to the following international arbitration treaties:

- The New York Convention 1958, given effect through the Recognition and Enforcement of Foreign Arbitral Awards 1985 which was enacted on 3rd February 1986. However, the Act repealed the New York Convention, replacing it with Sections 38 and 39 of the Act;
- The Washington Convention, given effect through the Convention on Settlement of Investment Disputes Act in 1966; and
- The ASEAN Comprehensive Investment Agreement 2009‘‘.

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Yes. Section 30 of the Act allows parties to agree on the substantive law to be applied to resolving the substance of a dispute referred to arbitration. In the absence of such agreement, the dispute shall be decided in accordance with the substantive law of Malaysia. However, for international arbitrations, failing any agreement, the arbitral tribunal shall apply “*the law determined by the conflict of laws rules.*”

Whether this refers to the conflict of laws rules of Malaysia, or some other jurisdiction or legal system, is not entirely clear from the judgment of the Federal Court in Thai-Lao Lignite Co Ltd & Anor v The Government of the Lao People’s Democratic Republic [2017] 6 AMR 219 at [186].

This arises because, unlike Article 28(2) of the UNCITRAL Model Law 1985, Section 30(4) of the Act provides that ‘the arbitral tribunal shall apply the law determined by the conflict of laws rules.’ This is distinguishable from the corresponding provision in the UNCITRAL Model Law 1985, which provides that ‘the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable’. Section 30(4) of the Act omits the operative requirement of ‘which it considers applicable’, but maintains the definite article ‘the’ before ‘conflict of laws rules’. The only linguistically accurate interpretation of Section 30(4) of the Act would be that ‘the’ is referring to the Malaysian conflict of laws rules.

III. Arbitration Agreements

- (i) **Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?**

The legal requirements relating to the form and content of an arbitration agreement is set out in Section 9 of the Act, which provides a statutory definition and form of an arbitration agreement. This section is modelled after Article 7 of the UNCITRAL Model Law on International Commercial Arbitration 1985 (**‘Model Law’**) without any significant changes. The main legal requirements are:

- the arbitration agreement be contained in a principal agreement, or in a separate agreement, or can be incorporated by reference; or
- the arbitration agreement must be in writing, i.e. it must be a document signed by the parties, or contained in an exchange of written communication, or by way of an exchange of a statement of claim and defence in which the existence of an agreement to arbitrate is alleged by one party and not denied by the other.

In the light of the decision in Thai-Lao Lignite Co Ltd & Anor v The Government of the Lao People’s Democratic Republic [2017] 6 AMR 219, it is recommended that:

- arbitration clauses be drafted widely, if parties intend for all their disputes to be determined by arbitration; and
- an express choice of law clause be included for the governing law of the arbitration agreement.

Multi-tiered dispute resolution clauses can be incorporated, e.g. mediation under the applicable KLRCA Mediation Rules. However, the requirement of good faith negotiations prior to commencing arbitration should be avoided.

- (ii) **What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?**

As a general rule, courts will enforce arbitration agreements.

Under Section 10(1) of the Act, the High Court is required to stay court proceedings where the subject matter referred to litigation is the subject of an arbitration agreement. The High Court courts need not make a finding on the existence of a dispute before staying court proceedings pending arbitration.

However, an arbitration agreement shall not be enforceable where the agreement is null and void, inoperative or incapable of being performed. A stay would therefore not be ordered if the High Court finds the arbitration agreement to be null and void, inoperative or incapable of being performed. An arbitration agreement is also unenforceable in the event the party seeking to enforce the arbitration agreement takes a step in the court proceedings before making an application to stay the proceedings under Section 10(1) of the Act.

According to the Federal Court in Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417, the approach of Malaysian courts in hearing an application to stay court proceedings pending arbitration under Section 10 of the Act is to order a stay even when the validity of the arbitration agreement is challenged, or where one party alleges that the dispute does not fall within the ambit of the arbitration agreement, as such dispute is a matter which should be determined by the arbitral tribunal at first instance. Any party aggrieved by the tribunal's jurisdictional finding may appeal against the decision under Section 18(6) of the Act.

The approach of the High Court in enforcing an arbitration agreement in the face of proceedings brought to wind up a company may either be to stay the proceedings pending arbitration, or to strike out the petition to wind up the company: see e.g. Liew Yin Yin Construction Sdn Bhd v Yata Enterprise Sdn Bhd [1989] 3 MLJ; Syarikat Lian Ping Enterprise Sdn Bhd v Cygal Bhd [2000] 2 CLJ 814; and Syarikat Lian Ping Enterprise Sdn Bhd v Cygal Bhd [2000] 2 CLJ 814.

- (iii) **Are multi-tier clauses (e.g.: arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?**

Multi-tiered dispute resolution clauses are common particularly in standard

form contracts in the construction industry. Pre-arbitration procedures may include negotiation, mediation, conciliation, adjudication, expert determination, reference to a dispute review board and mini-trial.

Multi-tiered dispute resolution clauses are enforceable in Malaysia: see Usahasama SPNB-LTAT Sdn Bhd v ABI Construction Sdn Bhd [2016] 7 CLJ 275. In the event that parties disregard the prescribed dispute resolution mechanisms in multi-tiered arbitration clauses before referring a dispute to arbitration, the arbitral tribunal has no jurisdiction to decide the dispute.

There is no Malaysian decision to date on whether the consequence of an award rendered in breach of a multi-tiered arbitration clause renders a dispute non-arbitrable.

(iv) What are the requirements for a valid multi-party arbitration agreement?

In order for a multi-party arbitration agreement to be valid, the tribunal must be clearly and expressly conferred the power to allow a joinder of parties.

Under the repealed Arbitration Act 1952, the High Court in Lingkaran Luar Butterworth (Penang) Sdn Bhd v Perunding Jurutera Dah Sdn Bhd & Ors [2005] 6 CLJ 334 held that a tribunal has no power to order consolidation of arbitration proceedings or concurrent hearings. The position is similar under Section 40 of the Act.

However, a court may appoint the same arbitral tribunal to hear the various disputes consecutively to avoid inconsistent findings and save costs and time.

It should be noted that Rule 10 of the KLRCA Arbitration Rules 2017 empowers the Director of the KLRCA to consolidate two or more arbitrations upon the request of any party, or if the Director sees it fit to do so.

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

Yes. Under the repealed Arbitration Act 1952, the High Court in Majlis Perbandaran Seremban v Maraputra Sdn Bhd [2004] 5 MLJ 469 recognised that asymmetric arbitration clauses, which confer upon one party the sole or unilateral option to refer disputes to arbitration, is valid and binding and not unusual. The position should be the same under the 2005 Act.

For example, the Malaysian Public Works standard form of contracts only allows the contractor to bring issues and disputes to arbitration. Arbitrations under these contracts are regularly conducted and enforced in Malaysia.

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

Arbitration agreements cannot bind non-signatories in the manner of joining non-parties to an arbitration agreement. The general rule is that an arbitration agreement is not binding on a non-party or stranger to the agreement.

A person who is not a signatory to the arbitration agreement can be added as a party with the signatories' consent.

An arbitration agreement can bind a non-signatory if the underlying contract is validly assigned to a non-signatory: see Harris Adacom Corporation v Perkom Sdn Bhd [1993] 3 MLJ 506 (under the repealed Arbitration Act 1952).

Notably, in the case of court proceedings jointly involving non-signatories and signatories to an arbitration agreement, non-signatories may be bound by an order to stay the entire court proceedings pending reference to arbitration: see Renault SA v Inokom Corp Sdn Bhd & Anor (and Other Appeals) [2010] 5 MLJ 394 (decided under the repealed Arbitration Act 1952).

IV. Arbitrability and Jurisdiction

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

Under Section 4 of the Act, any dispute which the parties have agreed to arbitrate may be arbitrated unless the arbitration agreement is contrary to public policy. The fact that any written law confers jurisdiction in respect of any matter on any court of law, but does not refer to the determination of that matter shall not, by itself, indicate that a dispute about that matter is not capable of determination by arbitration.

There have not been many decisions on the arbitrability of particular subject matters in Malaysia. The Court of Appeal in Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394 held tortious disputes to be arbitrable.

Some of the disputes which have been found to be non-arbitrable are as follows:

- Disputes relating to any act, duty or functions carried out by a statutory body in the exercise of its statutory powers: see Pendaftar Pertubuhan Malaysia v Establishmen Tribunal Timbangtara Malaysia & Ors [2011] 6 CLJ 684.

- Matters which fall under the scope of the summary determination procedure for defaults on a registered charge (a charge registered under the National Land Code gives the chargee an interest in the land with a statutory right to enforce his security by way of a sale of land under Section 253 of that Code or by taking possession thereof under Section 271 in the event of the chargor's default). The legal title in the land remains vested in the registered proprietor. on land: see Arch Reinsurance Ltd v Akay Holdings Sdn Bhd (Civil Appeal No. 02(F)-9-03/2016(W)).

According to the Federal Court in Press Metal Sarawak Sdn Bhd v Etika Takaful Bhd [2016] 5 MLJ 417, where a stay of proceedings pending reference to arbitration is opposed on the basis of non-arbitrability of subject matter, the matter should be determined by the arbitral tribunal at first instance. Any party aggrieved by the tribunal's jurisdictional finding may then appeal to the High Court against the decision of the tribunal under Section 18(6) of the Act.

The court may decide on an issue of arbitrability if an award is challenged under Section 37 of the Act, or if recognition and enforcement is sought to be refused under Section 39 of the Act.

There has been no Malaysian decision on whether non-arbitrability is a matter of jurisdiction or admissibility.

(ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?

Under Section 10 of the Act, when court proceedings are initiated despite the existence of a valid arbitration agreement, the defendant must enter an appearance in the court proceeding and make an application to stay the court proceeding pending arbitration. The defendant must do so without taking any other steps in the court proceedings. By participating in court proceedings instead of having the proceedings stayed, the parties would effectively have waived their right to arbitrate the issue and/or the dispute. However, the filing of an application to dispute jurisdiction will not be construed as a submission to the jurisdiction of the court.

Case law provides that the time limit for raising the objection shall be no later than the submission of statement of defence unless the tribunal considers the delay justified and admits a later plea. In the case of counterclaims, the objection must be made when the claimant files its reply.

- (iii) **Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?**

An arbitral tribunal can rule on its own jurisdiction by virtue of the principle competence-competence, which is codified in Section 18(1) of the Act.

The High Court does not intervene to determine the tribunal's jurisdiction before the arbitral tribunal has itself considered its own jurisdiction.

Any aggrieved party from the arbitral tribunal's power to rule on such a plea as a preliminary question that it has jurisdiction may within 30 days request the High Court to make a final decision on the matter. According to the High Court in Usahasama SPNB-LTAT Sdn Bhd v ABI Construction Sdn Bhd [2016] 7 CLJ 275, the challenge to the decision is by way of an appeal, which involves a rehearing of the jurisdictional objection. As such, the arbitral tribunal's decision on the issue of jurisdiction is not final.

V. Selection of Arbitrators

- (i) **How are arbitrators selected? Do courts play a role?**

Section 12(1) of the Act provides parties the autonomy to determine the number of arbitrators, whereas Section 13(2) of the Act provides parties the autonomy to agree on the procedure for appointing an arbitrator or the presiding arbitrator, or both. It is common for arbitration rules in Malaysia to set out the appointment procedure.

Section 13 of the Act sets out the default procedure in the event of parties' failure to agree on a procedure for appointment, or fail to agree on an arbitrator. Where the parties fail to make provision for the appointment procedure in the arbitration agreement or if there is disagreement or if they refuse to exercise their rights to appoint a member of the arbitral tribunal, then the Director of the KLRCA is given the power to appoint the arbitrator and he has to do so within 30 days, failing which the parties could request the High Court to appoint an arbitrator.

Where the Director of the KLRCA or the High Court appoints an arbitrator, both bodies shall have due regard to any qualifications required of the arbitrator by the agreement of the parties, other considerations that are likely to secure the appointment of an independent and impartial arbitrator and in the case of an international arbitration, the advisability of appointing an arbitrator of a nationality other than those of the parties.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

Section 14 of the Act provides that an arbitrator must be independent and impartial. In MMC Engineering Group Bhd & Anor v Wayss & Freytag (M) Sdn Bhd & Anor [2015] MLJU 477, the High Court held that circumstances which will raise issues as to impartiality and independence include a personal, business or professional relationship with one party to a dispute or an interest in the outcome of the dispute. Section 14(1) of the Act imposes on an arbitrator a continuing duty to disclose any circumstances likely to give rise to justifiable doubts as to his/her impartiality.

The procedures for challenging an arbitrator's independence or impartiality are stated in Section 15 of the Act which provides that a challenge may be initiated within 15 days from the constitution of the tribunal or any reasons stated under Section 14(3) of the Act by sending a written statement of the reasons for the challenge to the arbitral tribunal.

Should the challenge be unsuccessful, the aggrieved party may apply to the High Court to make a decision on the challenge in which case the procedural rules contained in the Rules of Court shall apply.

The normal grounds on which challenges are mounted are usually bias and conflict of interest. The test for apparent bias is the 'real danger of bias' test. Challenges are uncommon and are only made if the parties have some real and cogent evidence of bias.

Under the KLRCA Arbitration Rules 2017, where the Director of the KLRCA allows a challenge to an arbitrator, he must state the reasons for doing so.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

Section 13 of the Act provides for the arbitrator to be appointed freely by any of the parties. Therefore, limitations may be imposed contractually.

There are no prescribed ethics for the arbitrators; however, they are expected to be impartial and free from any form of conflict.

The ethical duties of arbitrators are generally set out in the respective arbitral bodies in Malaysia. For example, the KLRCA's Code of Conduct for Arbitrators governs arbitrators who serve on the KLRCA's panel of arbitrators.

- (iv) **Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?**

In practice, the IBA Guidelines on Conflicts of Interest which require all arbitrators to remain free of bias have been persuasive in Malaysia. Both *Pertubuhan Arkitek Malaysia* ('PAM') and the KLRCA have specific declaration forms that every arbitrator is required to sign before his/her appointment is confirmed. Experienced arbitrators within Malaysia who deal with domestic and international arbitrations are aware of the said guidelines.

For example, clause 2.1 of the KLRCA's Code of Conduct for Arbitrators incorporates the IBA Guidelines on Conflict of Interest as a point of reference.

VI. Interim Measures

- (i) **Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?**

Arbitrators have the power to order interim measures in the course of the arbitration.

Section 19 of the Act provides that, unless otherwise agreed by the parties, a party may apply to the arbitral tribunal for any of the following orders:

- security for costs;
- discovery of documents and interrogatories;
- giving of evidence by affidavit; and
- the preservation, interim custody or sale of any property, which is the subject-matter of the dispute.

Interim measures granted under the Act may be issued as interim awards or interlocutory orders.

Interim measures (whether issued as interim awards or interlocutory orders) are enforceable pursuant to the provisions for recognition and enforcement of an arbitral award under Sections 38 and 39 of the Act, which apply to interim orders, unless otherwise agreed by the parties.

- (ii) **Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following the constitution of the arbitral tribunal?**

According to Section 8 of the Act, the High Court may only grant provisional relief in support of arbitration if so provided by the Act.

Section 11 of the Act provides that a party may, before or during arbitral proceedings (whether seated in Malaysia or not), apply to the High Court for any interim measure and the High Court may make the following orders for:

- security for costs;
- discovery of documents and interrogatories;
- giving of evidence by affidavit;
- appointment of a receiver;
- securing the amount in dispute;
- the preservation, interim custody or sale of any property which is the subject matter of the dispute;
- ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
- an interim injunction or any other interim measure.

Interim measures may be ordered by the High Court after the constitution of an arbitral tribunal. However, Section 11(2) of the Act provides that if an arbitral tribunal has already ruled on any matter which is relevant to an application for interim relief, the High Court shall treat such finding of fact by the arbitral tribunal as conclusive.

Other powers exercisable by the High Court in support of arbitration include:

- staying court proceedings commenced in breach of an arbitration agreement (Section 10 of the Act); and
- consolidating or ordering for concurrent hearings of arbitral proceedings (Section 40 of the Act).

The powers granted to the arbitrators after the constitution of the arbitral tribunal under the Act are equivalent to that of the High Court. Once an arbitral tribunal has been constituted, the arbitral tribunal should strictly be the first body to decide on interim measures and parties should first apply to the arbitral tribunal for the relevant interim measures sought as opposed to seeking court intervention from the outset.

A court order for interim relief may remain in effect after the arbitral tribunal is constituted until and unless set-aside or the said order has lapsed.

- (iii) **To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?**

The Courts can grant such assistance and relief. See VI(ii) above.

No consent is needed by the tribunal prior to obtaining the interim orders from the court.

VII. Disclosure/Discovery

- (i) **What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?**

A party can apply to the arbitral tribunal under Section 19(1) of the Act for discovery. The types of discovery typically permitted are:

- discovery / production of documents;
- interrogatories; and
- giving of evidence by affidavit.

Under Section 21(3)(f) and (h) of the Act, unless the parties agree otherwise, the arbitral tribunal may order the discovery and production of documents or materials within the possession or power of a party or order that any evidence be given on oath or affirmation.

Under Section 29(2) of the Act, any party may with the approval of the arbitral tribunal apply to the High Court for assistance in taking evidence. The High Court may order the attendance of a witness to give evidence or, where applicable, produce documents on oath or affirmation before an officer of the High Court or any other person, including the arbitral tribunal.

- (ii) **What, if any, limits are there on the permissible scope of disclosure or discovery?**

An arbitrator cannot order discovery against a non-party to the arbitration proceedings. In such cases, an application ought to be made to the High Court for assistance under Section 29(2) of the Act. See VII(i) above.

(iii) Are there special rules for handling electronically stored information?

No.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

Arbitrations are generally confidential.

There are no statutory provisions on confidentiality. However, the Court of Appeal in Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd [2016] 2 MLJ 697 observed that it is the policy of the Act to maintain confidentiality.

Given that many parties adopt arbitration as their dispute resolution tool for the confidentiality it may grant to the proceedings, it is common practice for the parties to have an express confidentiality clause in their arbitration agreement (by, in most cases, adopting a set of institutional rules which contain such a clause). For example, Rule 16(1) of the KLRCA Arbitration Rules 2017 mandates that the arbitral tribunal, the parties, all experts, all witnesses and the KLRCA a duty of confidentiality, subject to circumstances where disclosure is necessary for challenging or enforcing an award, or pursuant to any legitimate legal duty or legal right.

If there is an express confidentiality clause in the arbitration agreement requiring parties to treat the arbitration proceedings (including their existence) as confidential, the parties are generally bound by it.

However, there are certain exceptions to this general rule. The exceptions include instances where the parties subsequently agree that the confidentiality requirement may be waived, or where a court orders disclosure or grants permission to disregard the confidentiality obligation to establish or protect an arbitrating party's legal rights *vis-a-vis* a third party in order to bring a cause of action against that third party or defend the claim or counterclaim brought by the third party.

In Malaysian Newsprint Industries Sdn Bhd v Bechtel International, Inc & Anor [2008] 5 MLJ 254, the High Court appeared to adopt the English law position that a presumption of confidentiality arises as an implied term of an arbitration agreement, even in the absence of an express term for confidentiality.

On 7 November 2017 in Kuala Lumpur High Court Originating Summons No. WA-24NCC(ARB)-17-02/2017 Sabah Electricity Sdn Bhd (previously known as 'Lembaga Letrik Sabah') v Sandakan Power Corporation Sdn Bhd and

another suit, the High Court affirmed that where proceedings are commenced to register and enforce an award in Malaysia, the High Court does not have the power to order a redaction of any part of the award sought to be registered and enforced on the premise that there is no express power to do under the Act, unlike in other jurisdictions such as Singapore.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

There are no apparent statutory provisions which relate to the protection of trade secrets in arbitration and confidential information. Such protection should be sought at the outset through express contractual provisions in the arbitration agreement or at the initial preliminary hearing before the arbitral tribunal.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

There is no provision in the Act which deals with privilege. Rules of privilege are instead derived from common law principles adopted by Malaysian case law and the Evidence Act 1950. Generally, there is attorney-client privilege.

It is to be noted that in-house counsel are not protected by privilege generally in Malaysia.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

Of late it has become more common for parties to adopt the IBA Rules on the Taking of Evidence in International Arbitration. Most experienced arbitrators in Malaysia who preside over domestic and international arbitrations generally refer to the said Rules in the first procedural order for organising the proceedings as being the applicable procedural rule of evidence, subject to the tribunal retaining the discretion to depart from them.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

The parties are free to agree on arbitration rules and this is expressly envisaged and provided for in the Act, where most of the provisions only apply unless otherwise agreed by the parties. However, there are mandatory provisions that cannot be altered by the rules which cover the fundamentals of arbitration.

Where parties fail to agree to the procedure to be followed by the arbitral tribunal in conducting the proceedings, Section 21(2) of the Act allows the arbitral tribunal to conduct the arbitration in such a manner as it considers appropriate, subject to the provisions of the Act.

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

It is common practice for witness testimony to be given in the form of sworn written witness statements or witness statements signed by the witness. The arbitral tribunal sets down the timetable and procedure for the completion and exchange of witness statements. Witness statements in rebuttal may also be exchanged subsequently if directed by the arbitral tribunal.

Following the initial questioning of the witness by the party calling him, the witness will be tendered for cross-examination by the other parties and thereafter be re-examined.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

According to Section 118 of the Evidence Act 1950, all persons should be competent to testify except those who are: (a) unable to understand the questions put to them (b) unable to give rational answers to those questions due to (i) tender age, (ii) extreme old age, (iii) disease, whether body or mind, or (vi) any other cause of the same kind. The evidence is given on oath or affirmation.

Section 21(3)(h) of the Act empowers the arbitral tribunal to direct that a party or witness be examined on oath or affirmation.

- (v) **Are there any differences between the testimony of a witness specially connected with one of the parties (e.g. legal representative) and the testimony of unrelated witnesses?**

The difference lies in the admissibility of the witness testimony.

For unrelated witnesses, the ordinary provisions on admissibility of evidence under the Evidence Act 1950 apply.

For specially connected witnesses, e.g. legal representatives, witness evidence is ordinarily protected from production. However, communication between specially connected witnesses under the direct employment of one of the parties, e.g. between in-house legal counsel and his/her company or employer may not be protected by privilege.

- (vi) **How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?**

There is some flexibility on how expert evidence is presented.

Expert evidence is presented by way of a written report. The contents of the written report may pertain only to non-agreed technical facts, depending on whether there is any agreement on technical facts by the experts, where such procedure is sanctioned by the parties and the arbitral tribunal.

As for examination of the expert, there are a number of common approaches, e.g.:

- the experts may be heard after the witnesses of facts for each party have testified; or
- the experts to be heard simultaneously on an agenda basis with each expert asked to comment and respond to the opinions of the other experts.

There are no rules for any formal requirements regarding independence and/or impartiality of an expert witness. An expert shall not compromise his/her professional integrity and independence but will state his/her opinion based on facts which he has personally verified or for which there is credible evidence before the arbitrator.

- (vii) **Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a**

particular list?

In practice, party-appointed experts are more common than tribunal-appointed experts. Section 28(2) of the Act provides the arbitral tribunal the power to appoint its own expert. It allows for the possibility of participation by the tribunal-appointed expert in the hearing and the parties putting questions to him during the proceedings. The arbitral tribunal is obliged to hold such hearings if any party so requests or can call for one on its own motion if it considers it necessary. The parties are at liberty to present their own expert witnesses at this hearing. Alternatively, parties can also agree that no such hearings be held.

There is no rule that different weight be given to party-appointed experts as compared to tribunal-appointed experts.

There is no requirement for an expert to be selected from a particular list.

(viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?

In Malaysia, witness conferencing for experts is used. The format and procedure differs from case to case, but the arbitrator will ask questions as part of the discussion and counsel for either side may join in. The parties can also suggest questions for the tribunal to ask.

(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?

There is no strict requirement or rules for the use of an arbitral secretary in Malaysia. It is relatively common for arbitral secretaries to be used in ad hoc arbitrations to assist the sole arbitrator or the arbitral tribunal in the administration of the arbitration.

X. Awards**(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?**

Section 33 of the Act defines an award as a decision of the arbitral tribunal on the substance of the dispute and includes interim, additional, agreed and final awards.

Section 33(1) of the Act requires that the award should be in writing and signed by the arbitrator(s). Where there are three arbitrators, the signature of

the majority of the members of the arbitral tribunal would suffice provided the reasons for any omitted signature are stated. The award should state the reasons for the award unless the parties have stated otherwise or if the award is made on agreed terms. The award should also be dated and state the place of arbitration.

It should be sufficient if the award shows why the arbitral tribunal found for one party instead of the other. The award should set out the facts, explain the arbitral tribunal's findings and how it reached its conclusions so as to enable the parties to understand them and why particular points were decisive.

There are no statutory limitations on the types of permissible relief. An arbitral tribunal may award any remedies available in a court of law, which includes specific performance.

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

Arbitrators, like the Malaysian civil courts, may award special and exemplary damages where appropriate. Punitive damages, prevalent in the United States of America, are not generally awarded in Malaysia unless the contract that is the subject matter of the dispute expressly provides for it.

Section 33(6) of the Act provides that, unless otherwise provided in the arbitration agreement, the arbitral tribunal may award interest on any sum of money ordered to be paid by the award from the date of the award to the date of realisation and determine the rate of interest. The award of interest is based on the principal award sum and generally simple interest is awarded. It is not common for compound interest to be awarded unless the contract expressly provides for it.

On 15 November 2017, the Federal Court in Far East Holdings Bhd & Anor v Majlis Ugama Islam Dan Adat Resam Melayu Pahang [2018] 1 MLJ 1 held that, (i) unless otherwise provided in the arbitration agreement, an arbitral tribunal has no power to award pre-award interest; and (ii) post-award interest may only be awarded if pleaded by the parties in their respective statement of case or counterclaim, as the case may be.

(iii) Are interim or partial awards enforceable?

Both are enforceable. The provisions relating to the recognition and enforcement of an award under sections 38 and 39 of the Act apply to interim orders. The definition of an 'award' includes any final, interim or partial award and any award on costs or interest and excludes interlocutory orders.

- (iv) **Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?**

Yes. Dissenting opinions may be handed down to the award. Section 31 of the Act provides that any decision of the arbitral tribunal shall be made by a majority of all its members. However, the Act is silent on the specific form and content of dissenting opinions.

- (v) **Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?**

Yes. Section 32 of the Act, provides for settlement of disputes and for the settlement to terminate the proceedings. Further, if it is requested by the parties and not objected to by the arbitral tribunal, the arbitral tribunal may record the settlement in the form of award on agreed terms.

- (vi) **What powers, if any, do arbitrators have to correct or interpret an award?**

Pursuant to Section 35 of the Act, a party may within 30 days of the receipt of the award, request that the arbitrator correct any computation errors, clerical or typographical errors or any other such errors. The arbitral tribunal can also correct such errors on its own initiative.

The Act allows an arbitral tribunal, at the request of a party made within 30 days of the receipt of the award, to interpret the award on a specific point or part of the award and such interpretation shall form part of the award.

XI. Costs

- (i) **Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?**

Section 44 of the Act allows the arbitral tribunal wide discretion to award costs. While the general rule is that 'cost follows event', ie the unsuccessful party pays the cost of the arbitration, the arbitral tribunal need not do so if the arbitral tribunal finds reasons to depart from the rule. Parties may be ordered to bear their own costs and the costs of the arbitration in equal parts.

(ii) What are the elements of costs that are typically awarded?

An arbitral tribunal when awarding costs may award costs that falls into four (4) categories. This may include (1) the arbitrators' own costs, fees and expenses, (2) the fees and expenses of the arbitral institution involved, (3) the parties' costs and (4) the costs incidental to the arbitration which includes the fees of experts, translators and interpreters.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

Section 44 of the Act provides that the costs and expenses of the arbitration to be at the discretion of the arbitral tribunal. Alternatively, any party may apply to the High Court for costs to be taxed, in the event an award directs a party to pay costs and expenses, but fails to specify its amount within 30 days of having been requested to do so.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

Yes. Section 44(1)(a) of the Act provides that in the absence of an agreement by the parties on arbitration costs, the arbitral tribunal has the discretion to decide (i) which party will bear the cost of the arbitration; (ii) the quantum of the costs to be borne or to award; and (iii) to award costs on a 'solicitor and client' basis.

According to the Court of Appeal in SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd [2014] 2 MLJ 627, the arbitral tribunal can apportion costs in any manner it determines reasonable by taking into account the circumstances of the arbitration and need not follow the principle that 'costs follow the event'.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

The position provided under Section 44(5) of the Act is unclear on whether the Courts have the power to review the tribunal's decision on costs. However, the Court of Appeal in SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd [2014] 2 MLJ 627 observed that domestic courts have no such power.

XII. Challenges to Awards

- (i) How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?**

Awards may be challenged in the High Court in proceedings brought to set aside (wholly or partially) the award.

The application to set aside an award has to be made within 90 days of the aggrieved party's receipt of the award.

The grounds for setting aside such an award are set out in Section 37 of the Act and include the following: the award is contrary to the public policy of Malaysia, there was fraud or a breach of the rules of natural justice and such applications do not form an automatic stay of enforcement of the award as it must be made by application.

The average duration of challenge proceedings from commencement to disposal is between 3 to 6 months.

Challenge proceedings do not stay enforcement proceedings. Often, enforcement proceedings will be heard together.

- (ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?**

No.

However, parties may waive the right to recourse under Section 42 of the Act, ie to make a reference to the High Court on a question of law which arises out of an award. Section 42 of the Act may be opted out for domestic arbitrations, or opted in for international arbitrations.

- (iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?**

No.

- (iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so**

remanded?

The court may remit an award to the tribunal only under Section 42(4)(c) of the Act. The Court may only do so upon a party's reference to the High Court on a question of law arising out of the award, which substantially affects the rights of one or more of the parties. Such reference must be made within 42 days of receiving the award. The award may be remitted where the court finds that the arbitral tribunal has erred in its application of the law, where the *bona fides* and/or competency of the arbitral tribunal is not impugned, fresh evidence needs to be called or further determination of facts needs to be found.

XIII. Recognition and Enforcement of Awards

- (i) **What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?**

Section 38 of the Act provides a summary procedure for recognition and enforcement of awards as judgments and Section 39 of the said Act deals with grounds for refusing recognition or enforcement and it follows Article 36 of the Model Law. The competent court to apply to enforce and oppose enforcement of an arbitration award would be the High Court of Malaya for West Malaysian disputes and the High Court of Sabah and Sarawak for East Malaysian disputes.

An application to refuse the enforcement of an award does not result in the stay of enforcement, as the award is not enforceable without the High Court's order recognizing the award.

In practice, applications to enforce and applications to oppose enforcement are heard together before the same judge.

- (ii) **If an exequatur is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?**

If an arbitral award is recognised under Section 38 of the Act, the normal process of enforcement of judgments is available under the Rules of Court in order to allow the party to obtain money. Examples of the available modes of enforcement are writs of seizure and sale where the property is sold by the bailiff, garnishee proceedings or winding up proceedings.

- (iii) **Are conservatory measures available pending enforcement of the award?**

The High Court may order a party to provide appropriate security pending

enforcement of an award, under Section 39 of the Act.

According to the High Court in Mechanalysis Sdn Bhd (in liquidation) v Appraisal Property Management Sdn Bhd [2016] 11 MLJ 566, where an award-debtor refers a question of law arising out of an arbitral award to the High Court, the High Court may order the award-debtor to provide security for costs under Section 42 of the Act.

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Malaysia is supportive of arbitrations and ordinarily recognise and enforce arbitration awards as a matter of course. A restrictive view of the procedure for challenging an award under Sections 37 and 42 of the Act is adopted.

A recent decision by the Federal Court in Thai-Lao Lignite Co Ltd & Anor v The Government of the Lao People's Democratic Republic [2017] 6 AMR 219 suggests that arbitral awards may be reviewed by supervisory courts, provided that it is done in accordance with Section 8 of the Act, i.e. that no court shall intervene in matters governed by the Act except where so provided in the Act. However, the Federal Court also pronounced that *"if a supervisory court rubber stamps arbitral awards, arbitration will be dead in Malaysia and there will be no confidence in arbitration"*.

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

Enforcement of awards would fall under the jurisdiction of the new commercial courts of the High Court of Malaya which would have a time limit to complete such proceedings within nine months from the date of filing of the summons to enforce the award. As such the time limit can vary from three months to nine months, depending on whether there is any objection to the award being enforced. An appeal arising therefrom to the Court of Appeal may take six months to 12 months to be determined. Thereafter any application for leave to appeal to the Federal Court may take a further three to six months to be determined. If leave to appeal to the Federal Court is granted, the said appeal may take a further six to nine months to be determined.

The limitation period for bringing an action to enforce an award is six years from the date on which the Claimant became entitled to enforce an award.

XIV. Sovereign Immunity

- (i) **Do state parties enjoy immunities in your jurisdiction? Under what conditions?**

Domestic state parties

The Act is binding on Malaysia. Section 5 of the Act provides that the Act shall apply to any arbitration to which the Federal Government of Malaysia, or the Government of any component state of Malaysia, is a party.

The state has been party to a number of arbitration agreements, and have appeared as parties to references to the High Court on questions of law arising out of the award, e.g. *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617, *Chain Cycle Sdn Bhd v Kerajaan Malaysia* [2016] 1 CLJ 218.

Foreign state parties

The immunity afforded to foreign state parties is likely to be similar to that in litigation in Malaysian courts. In *Commonwealth of Australia v Midford (Malaysia) Sdn Bhd* [1990] 1 MLJ 475, the then Supreme Court held that Malaysia subscribes to the doctrine of restrictive state or sovereign immunity. Therefore, the defence of state or sovereign immunity is available for public governmental actions (*acta jure imperii*), but not if the impugned governmental action was of a commercial or private nature which is outside the scope of public governmental actions (*acta jure gestionis*).

- (ii) **Are there any special rules that apply to the enforcement of an award against a state or state entity?**

Domestic state parties

Upon registration of an award under Section 38 of the Act, in the case of a monetary award, an award creditor is required to obtain a certificate of judgment under Section 33 of the Government Proceedings Act 1956, which is a purely administrative application to the court. The state will then be under a statutory duty to pay the amount as certified.

However, in the event that the state refuses to comply with payment of the monetary award, the award-debtor is required to obtain a *mandamus* order to enforce compliance with the certificate of judgment by way of an application for judicial review.

Foreign state parties

There does not seem to be any special rule in relation to an enforcement of an award against a state or state entity in Malaysia. It would however be likely

that Sections 38 and 39 of the Act would apply as Section 38 of the Act provides a summary procedure for recognition and enforcement of awards as judgments and Section 39 of the Act, deals with grounds for refusing recognition or enforcement which follow Article 36 of the Model Law.

However, while a foreign state party may submit to the jurisdiction of the arbitral tribunal, that initial submission may not necessarily be construed as a submission to the jurisdiction of the court seized of an application by a non-state party award-creditor to enforce an arbitral award against a foreign state party award-debtor: see e.g. Duff Development Co Ltd v Kelantan Government and another [1924] All ER Rep 1. As such, enforcement of an award against a foreign state party is possible in the event the foreign party waives the privilege of sovereignty by submitting to the jurisdiction of the domestic court, or by prior specific agreement to that specific effect within the arbitration agreement.

XV. Investment Treaty Arbitration

- (i) **Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?**

Yes. Malaysia signed the Washington Convention on 22 Oct 1965 and ratified it on 8 Aug 1966. Malaysia is also a signatory of the 2009 Comprehensive Investment Treaty between members of ASEAN and the 2016 Trans-Pacific Partnership, or the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

Malaysia, as one of the ten Member States of the Association of South East Asian Nations ('ASEAN'), benefits from bilateral and multilateral treaties entered into by the ASEAN bloc.

Malaysia is also a party to the multilateral ASEAN Comprehensive Investment Agreement 2009.

- (ii) **Has your country entered into bilateral investment treaties with other countries?**

Yes. Malaysia is a signatory to at least 71 bilateral investment treaties ('BIT'), beginning with its first BIT signed with Germany on 22 December 1960.

XVI. Resources

- (i) **What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?**

The following should be referred to know more about arbitration in Malaysia

National arbitration legislation and related rules:

- Arbitration Act 2005[Act 646] (as amended in 2011)
- Order 69, Rules of Court [PU(A) 205/2012]
- Reciprocal Enforcement Of Judgments Act 1958 [Act 99]
- Convention on the Settlement of Investment Disputes Act 1966

Arbitral institution rules

- KLRCA Arbitration Rules (as revised in 2017)
- KLRCA Fast Track Rules (3rd edition, 24 October 2013)
- KLRCA i-Arbitration Rules (1st edition, as revised in 2017)
- KLRCA Mediation Rules (2014 reprint)

Books

- S Rajoo, Law, Practice and Procedure of Arbitration (Kuala Lumpur: Lexis Nexis, 2017)
- A Zakaria and P Koh (eds), Arbitration in Malaysia: A Practical Guide (Kuala Lumpur: Sweet & Maxwell, 2017)
- C Abraham and T Baskaran, 'Malaysia' in M J Moser and J Choong (eds), Asia Arbitration Handbook (New York: Oxford University Press, 2011)
- C Abraham 'Malaysia' in M J Moser (ed), Arbitration in Asia (JurisNet, LLC, 2009)
- S Rajoo and WSW Davidson The Arbitration Act 2005: UNCITRAL Model Law as Applied in Malaysia (Petaling Jaya : Sweet & Maxwell Asia, 2007)

- C Abraham 'Malaysia' in M J Moser (ed) Arbitration in Asia (Butterworths Asia, 2001)
- C Abraham 'Malaysia' in International Commercial Arbitration in Asia (ed) International Commercial Arbitration in Asia (ICC Publishing, 1998)

Key websites

- Kuala Lumpur Regional Centre for Arbitration www.klrca.org
- The Malaysian Institute of Arbitrators www.miarb.com
- Malaysian Institute of Architects www.pam.org.my
- Institution of Engineers Malaysia www.iem.org.my
- Institution of Surveyors Malaysia www.ism.org.my
- Malaysian International Chambers of Commerce www.iccmalaysia.org.my
- The Chinese Chamber of Commerce & Industry of Kuala Lumpur & Selangor www.chinesechamber.org.my
- Malaysia Rubber Board www.lgm.gov.my
- Palm Oil Refiners Association of Malaysia poram.org.my
- Security Industry Dispute Resolution Centre <https://sidrec.com.my>
- Federation of Oils, Seeds and Fats Association www.fosfa.org

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

Various arbitration educational events and conferences are held regularly in Malaysia.

Arbitration educational events

- KLRCA Talk Series and KLRCA Evening Talk Series – monthly
- CIArb Diploma Course in International Commercial Arbitration – January-February

Arbitration conferences

- Kuala Lumpur International Arbitration/ADR Week
- IBA Asia-Pacific Arbitration Group Training Days

XVII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

Yes.

Despite the significant decrease of backlogged cases in the Malaysian courts, arbitration has become a very attractive a form of alternative dispute resolution, due to a number of factors. For example:

- The official re-launching of the KLRCA in Bangunan Sulaiman in 2014, arbitration has played a greater role to play as a real alternative to court proceedings.
- Arbitration has become the default mode of dispute resolution in Malaysia for construction disputes, in the light of the KLRCA's Standard Form of Building Contracts for the construction industry, launched in 2017.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

Mediation in Malaysia has recently been gaining more focus and attention as most parties seek an alternative to overcome the backlog of cases in the Malaysian courts. Further, the recent attention given by the courts in Malaysia in using mediation as a form of settlement has increased awareness and usage of mediation to settle disputes.

The Mediation Act 2012 was enacted to promote and encourage mediation as a method of alternative dispute resolution in Malaysia, and to facilitate the settlement of disputes in a fair, speedy and cost-effective manner. The Act provides a procedural framework of rules for mediation, guarantees confidentiality of mediation proceedings and allows any settlement agreement to be recorded as a consent judgment or judgment of the court.

The Malaysian courts actively encourage and facilitate the settlement of civil disputes (as a whole or for interlocutory applications only) through mediation at various stages, i.e. pre-trial case management, trial and in appeal.

Various bodies provide mediation services:

- Malaysian Mediation Centre, under the Malaysian Bar Council;

- KLRCA, under the applicable KLRCA Mediation Rules; and
- Kuala Lumpur Court Mediation Centre, which provides free court-annexed mediation of civil disputes filed in the Kuala Lumpur Civil Courts.

The KLRCA recommends in its model arbitration clause a provision for pre-arbitration mediation under the applicable KLRCA Mediation Rules.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

Yes.

Construction Industry Payment and Adjudication Act 2012

The Construction Industry Payment and Adjudication Act 2012 ('CIPAA'), which came into force on 15 April 2014, introduces a summary interim dispute resolution process, described as 'adjudication', to resolve payment disputes arising from construction contracts and provides remedies for the recovery of payment upon conclusion of adjudication. It is designed to facilitate regular and timely payment in respect of construction contracts with the aim of alleviating cash flow problems that often affect the construction industry in Malaysia.

Adjudication is a mandatory statutory process which does not require the agreement of the parties for commencement of process. It supersedes any contractual agreements to the contrary between the parties. Adjudication is conducted privately and confidentially, and can be commenced at any time during or after the completion of a construction project.

A claimant who is owed monies under a construction contract may refer the dispute underlying the non-payment by the respondent to adjudication, if the dispute relating to non-payment is in connection with work done and services rendered under the express terms of a construction contract.

An adjudicator is required to decide the dispute and deliver a decision within 45 days from the close of the parties' case, failing which the decision would be void, and the adjudicator would not be entitled to any fees or expenses. The decision is binding pending the final resolution of the dispute by arbitration, litigation or agreement between the parties.

From 2015 to 2017, the KLRCA registered some 1,350 adjudication references.

For further information, please see <https://klrca.org/Adjudication-Overview>.

KLRCA Arbitration Rules 2017

The KLRCA last revised its Arbitration Rules in 2013. In the light of recent trends of costs and length optimization of arbitration proceedings, the KLRCA Arbitration Rules 2017 balances its 'light-touch' approach with more cost and

time effective procedural mechanisms.

Among the major amendments are:

- model arbitration clauses and submission agreements for multi-tiered dispute resolution;
- simplified fee schedules;
- technical review of awards by the Director of the KLRCA for the correction of perceived irregularities in draft awards;
- new rules for the joinder of third parties to arbitration proceedings;
- powers of the KLRCA Director to consolidate arbitrations; and
- enhanced transparency for the Director of the KLRCA's decision on challenges against an arbitrator.

New Standard Form of Building Contracts for the Malaysian Construction Industry

The KLRCA is the first arbitral institution to introduce a suite of standard form of building contract, which comprises of

- main contract (with quantities);
- main contract (without quantities);
- standard sub-contract; and
- minor works contract.

Among the main features are:

- accountability between an employer and an architect;
- architect's right to appoint and delegate duties to a suitably qualified representative;
- CIPAA-compliant provisions;
- comprehensive provisions on payment, valuation, variation and extension of time; and
- provisions to address bribery and corruption.

KLRCA i-Arbitration

In 2017, the KLRCA launched its revised edition of the KLRCA i-Arbitration

Rules, which adopts the UNCITRAL Arbitration Rules 2010 (as revised in 2013) for arbitration of disputes arising from commercial transactions premised on Islamic principles. The i-Arbitration Rules incorporate an expert reference procedure in relation to a Shariah Advisory Council or Shariah expert (both to be determined according to the characteristics of the agreement or transaction in dispute and consent of the parties), whenever the tribunal is required to form an opinion on a point relating to Shariah principles.

Asian International Arbitration Centre

From 2018 onwards, the KLRCA will be known as the Asian International Arbitration Centre.

Amendments to the Arbitration Act 2005

The Government of Malaysia is presently considering and reviewing further refinements to the Act.