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Panorama of Arbitration in Malaysia: Developments in Review

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Amid the rise of arbitration-friendly regimes, Malaysia has emerged as one of the preferred seats of arbitration in Asia. Several coordinated factors support Malaysia's emergence as a pro-arbitration jurisdiction. These include significant amendments to the Arbitration Act 2005 (the "**Act**"), the pro-arbitration position taken by the Malaysian Judiciary, and the rise of the Asian International Arbitration Centre (the "**AIAC**") as a premier arbitration institute in the region.

Significant Changes in Malaysia's Arbitration Laws

The amendments to the Act, both in 2011 and 2018, brought Malaysia's arbitration law in line with international expectations. The Act, like many similar arbitration acts, embodies the spirit of the UNCITRAL Model Law. The amendments to the Act include provisions related to the minimal intervention of courts in the arbitration process, expansion of the scope of the powers of the arbitral tribunal, and the recognition of Emergency Arbitration proceedings, which aligns with the AIAC Arbitration Rules 2018. Significantly, in 2019, the AIAC completed its first Emergency Arbitrator application and appointment. It has also received a growing number of enquiries regarding such. Additionally, changes in respect of confidentiality, interim measures, and the definition of an arbitration agreement and party representatives have also been included. Arguably, the most topical amendment was repealing the power to appeal of an award on a question of law, implicitly enhancing the finality of Malaysian-seated awards.

Developments in Arbitration from the Bench

Recently, the Chief Justice of Malaysia highlighted the importance of ADR in her Keynote Speech at the China-ASEAN Forum (the "**Forum**") on 13 November 2019 which was co-organised by the AIAC, the Hainan International Arbitration Court, the ASEAN Law Association of Malaysia, and the China ASEAN Legal Corporation Centre.

She mentioned how the judiciary has, in recent times, recognised the advantages of arbitration as well as other ADR mechanisms in developing a robust framework for dispute resolution.

In discussing the AIAC, her Ladyship stated that

> "*the significant role of the AIAC cannot be understated* [and] *the work it has done in the past has greatly improved the arbitration scheme in Malaysia* [by not only its] *tremendous job in establishing its own set of rules that parties may feel free to adopt …* [but] *drafting of rules aside, the AIAC constantly undertakes efforts to ensure that our arbitration laws remain up to date*".

The Malaysian courts have also clarified the legal position on numerous issues relating to and arising out of arbitration, leading to more predictability in Malaysian-seated arbitrations.

In *NFC Labuan Shipleasing I Ltd v Semua Chemical Shipping Sdn Bhd* [2017] MLJU 900 ("***NFC***") and *Awangsa Bina Sdn Bhd v Mayland Avenue Sdn Bhd [2019] MLJU 1365 ("**Awangsa**")*, the High Court considered the issue of stay of winding-up proceedings in the event of an arbitration clause. These two decisions appear to conflict but read closer, they clarify Malaysia's position. The Court in *NFC* held that a winding-up proceeding could not be stayed pursuant to Section 10 of the Arbitration Act itself. In contrast, the Court in *Awangsa* held that the Court could exercise its discretion to dismiss the winding-up petition and allow the dispute to be referred to arbitration. However, to dismiss the winding-up petition, the debtor must demonstrate that there is a *prima facie* dispute of debt, and the purported dispute falls within the ambit of the arbitration clause.

The High Court in *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd [2019] 10 MLJ 693,* examined the newly inserted Section 41A of the Act and its application to non-parties to an arbitration. The Court held that non-parties to arbitrations are not bound by the statutory duty of confidentiality. Accordingly, as a non-party, the plaintiff was not required to obtain consent from the parties, nor did it need to apply for an exemption under Section 41A(2) to disclose information related to the arbitration even though it was confidential.

The High Court in *WRP Asia Pacific Sdn Bhd & Anor v TAEL Tijari Partners Ltd & Ors [2019] MLJU 1244,* set aside an earlier granted interim measure in aid of arbitration under Section 11 of the Act. The Court justified its decision on the material change in circumstances and the discovery of material facts suppressed at the original hearing.

Under Section 37 of the Act, an award can be set aside on the grounds of breach of public policy and natural justice. In *Jan de Nul (M) Sdn Bhd v Vincent Tan Chee Yioun [2019] 2 MLJ 413,* the Federal Court examined its high threshold. The Court clarified that public policy ought to be read narrowly and restrictively in the context of an application to set aside an award, namely that the arbitral process itself must be compromised, rather than a mere mistake of fact and/or law. In *Allianz General*

Insurance Company Malaysia Berhad v Virginia Surety Company Labuan Branch, the High Court ruled that the amount of arbitrator's written reasoning when addressing an issue in an arbitral award is not enough to establish a breach of natural justice under Section 37 of the Act.

The Court of Appeal's decision in *Tune Talk Sdn Bhd v. Padda Gurtaj Singh* [2019] MLJU 67 reinforces the pro-enforcement position taken by Malaysian courts. The Court held that Sections 38 and 39 of the Act are exhaustive. Thus, if the substantive requirements of Section 38 are fulfilled, and no grounds for refusal under Section 39 exist, the Court must recognise and enforce the award. Additionally, the Court clarified that Order 69 of the Rules of Court 2012 is merely the means by which enforcement and recognition of an award are obtained, and non-compliance with it is not fatal.

In *Siemens Industry Software Gmbh & Co Kg (Germany)(formerly known as Innotec Gmbh) v Jacob and Toralf Consulting Sdn Bhd (formerly known as Innotec Asia Pacific Sdn Bhd)(Malaysia) & Ors*, the Federal Court overturned the Court of Appeal's decision and held that only the dispositive section of an arbitral award, as opposed to the entire arbitral award, is to be registered for enforcement under Section 38 of the Act so to uphold confidentiality of the arbitration.

Decisions have also been rendered on the nexus between a party's dilatory tactics in arbitration and the assessment of damages, as well as the ambit of party autonomy in a third-party's anti-arbitration injunction to restrain the conduct of arbitral proceedings.

These decisions demonstrate the Malaysian judiciary's support of arbitration. The courts are cautious about interfering with arbitration, or setting aside arbitral awards, and seek to uphold the objectives of the Act. However, at the same time, due regard is given to the rights of third parties and individuals not bound by the arbitration, successfully establishing a justified balance.

A Peek at the Emerging Trends

The Malaysian Government and the legal community in Malaysia have shown sustainable efforts in promoting arbitration as a dispute resolution process, with the AIAC at the forefront. The steady increase of domestic and international arbitrations seated in Malaysia is reflected by the continuing growth of the AIAC's arbitration caseload. In fact, the number of appointments and confirmations of arbitrators by the Director of AIAC doubled, from 75 in 2018 to 150 in 2019. A good year for arbitration, 2019 saw 27 new ad-hoc cases and 98 new administered cases at the AIAC, indicating parties' preference for institutional arbitration.

The Emergence of Malaysia as a Dispute Resolution Hub

Malaysia's strategic location and involvement in various significant projects facilitate

its development into a sophisticated dispute resolution hub.

In keeping with this goal, the AIAC has undertaken numerous steps to foster the development of ADR processes for projects under the BRI. During the Forum, delegates discussed issues such as harmonisation of law, cross-border enforcement of arbitral awards, and a call for cooperation between ASEAN and China as partners in the BRI. Following the introduction of the Singapore Convention, and to promote the use of mediation in resolving disputes with Chinese parties, the AIAC translated its Mediation Rules into Chinese.

India has also developed strong relations with Malaysia and the ASEAN countries as a leading trade and investment partner. The AIAC has been instrumental in partnering with several leading law firms and dispute resolution centres in India by conducting ADR training programs designed for practitioners, advocates, and in-house counsel. Notable initiatives by the AIAC include "The Malayan Tiger's Journey to India: A New Dawn of ADR" conference, which was organised in New Delhi in September 2019. The conference successfully addressed issues relating to different aspects of arbitration law and practice.

Conclusion

While the growing popularity of arbitration can be attributed to its features of party autonomy, flexibility, neutrality, and enforceability, its use is boosted by the rise of arbitration-friendly regimes, especially in the Asia-Pacific. Malaysia has also joined suit by embracing the changing standards of international arbitration. The recent developments in the country and the rising number of arbitration cases all indicate a bright future for arbitration in Malaysia.

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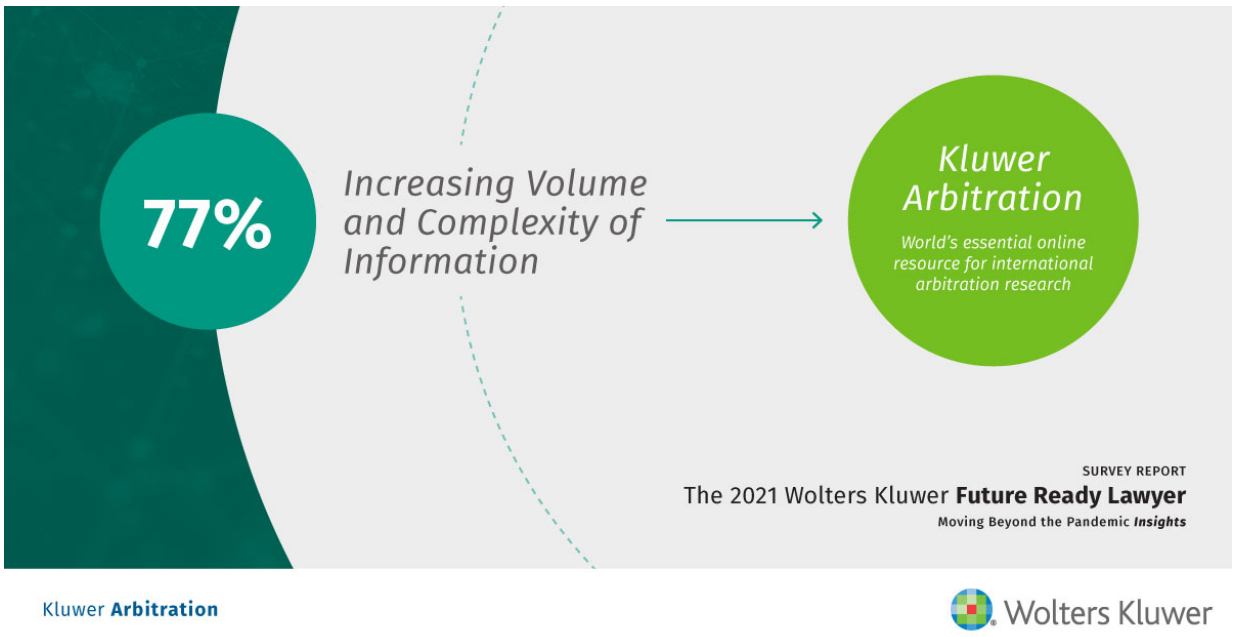

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