Kluwer Arbitration Blog

Asia ADR Week 2022 Recap: Rechartering a Modern Legislative Framework

Sanjev Sharma (Asian International Arbitration Centre) · Friday, October 14th, 2022 · Asian International Arbitration Centre (AIAC)

Introduction

The second day of the Asia ADR Week 2022 kicked off with a panel discussion on *Rechartering a Modern Legislative Framework* with Mr Abang Iwawan (Abang & Co.) as moderator. Mr Iwawan was joined by Ms Karen Ng Gek Suan (Karen, Mak & Partners), Mr Rajendra Navaratnam (Azman Davidson & Co.), Mr Foo Joon Liang (Gan Partnership), Ms Asya Jamaludin (CMS Singapore), Dato' Nitin Nadkarni (Lee Hishammuddin Allen & Gledhill) and Ms Kamilah Kasim (Rahmat Lim & Partners).

The panel endeavoured to put to test Malaysia's status as a "pro-arbitration" jurisdiction by scrutinising the Arbitration Act 2005 ("**the Act**"), as amended in 2018.

Ms Ng kickstarted the panel discussion by highlighting the pillars of the arbitration framework in Malaysia, which include (i) the recognition and enforcement of arbitration agreements and awards and (ii) the supervisory role of the courts. These pillars are evidently reinforced by Section 8 of the Act, which prevents court intervention other than that provided for in the Act. Section 8 of the Act states "*no court shall intervene in matters governed by this Act, except where so provided in this Act*."[1)]

Should Section 42 of the Act Be Reinstated?

Promotion of the finality of arbitral awards

Ms Ng then discussed one notable amendment to the Act in 2018.

Previously, Section 42 of the Act provided that any party may refer to the High Court any question of law arising out of an award. This section was frequently misused by parties to delay the final resolution of the dispute, by dressing up questions of fact as questions of law that could be referred to the High Court. This consequently created the perception that an arbitrator is an inferior tribunal in Malaysia whose award is subject to review by the High Court.

The 2018 amendment to the Act deleted Section 42, thus promoting the finality of arbitral awards

in the jurisdiction.

Ms Ng highlighted the way in which this change has refocused the practice of arbitration, with practitioners and parties alike now opting more frequently to have disputes resolved through arbitration. This has subsequently resulted in the diversification of arbitral practice, which now encompasses sports arbitration, maritime arbitration and domain name dispute resolution, among others.

Ms Ng concluded her presentation by leaving the audience with the question of whether there is a need to bring back Section 42 of the Act, albeit in a limited way, to prevent arbitration in Malaysia from going off the track. This was linked to the speaker's observation that practitioners are placing more importance on the strategic front of arbitration, which deviates from the core objective of arbitration as a holistic dispute resolution mechanism. In the latter context, some form of control by the Court may be required to guide disputants.

Restoring the Original Intent of the Act

As part of the team who drafted the original Act, Mr Navaratnam emphasised the need to bring the soul of the Act back in line with the UNCITRAL Model Law. Mr Navaratnam sought to examine if and how the 2018 amendments have detracted from the philosophy of the original Act.

Initially, the Act accorded only international parties the option to subscribe to the regime which saw minimal court interference that was limited to jurisdictional or public policy grounds. Domestic arbitrations, however, were subject to greater court interference and additionally allowed challenges to the Court on errors of law. This duality of character was intended to give confidence to international investors who would take comfort in knowing that they are protected in the same way as they would be in any other Model Law country.

Mr Navaratnam viewed the repeal of Section 42 of the Act as throwing the baby out with the bathwater. It took away the Act's duality of character and protected the finality of the process at the expense of protection from the Court for the parties. This tied in with Mr Iwawan's earlier remark, that the "real fear" of arbitration users is potentially bad arbitral awards that cannot be remedied by the courts.

Mr Navaratnam suggested that the Malaysia Bar Council's proposal to reinstate Section 42 of the Act with an additional control (i.e. leave from the court will be needed to bring an application under Section 42), together with a redefinition of "international arbitration", appear to be the most viable path to a modern legislative framework. On the latter suggestion, Mr Navaratnam highlighted the situation in which the domestic parties to an arbitration are in substance international parties – in that situation, should the arbitration be considered an "international arbitration"?

Mr Abang asked the panel if reinstating Section 42 of the Act is necessary when there is already an existing mechanism in Section 37 for parties to set aside an award on breach of natural justice or public policy. To this:

- Mr Navaratnam clarified that even if Section 42 were to be brought back, it should apply to only domestic arbitrations and not international ones. This would complement the Act's duality of character.
- Dato' Nitin opined that even if Section 42 is in place, parties should be allowed to contract out of

the application of that provision should they not want the courts to interfere in their dispute on the grounds set out in provision.

The Court's Non-interventionist Approach to Dealing with Applications under Section 37 of the Act

In the next segment of the discussion, Mr Foo illustrated the non-interventionist approach taken by the courts with reference to two recent Federal Court cases, which addressed applications to set aside arbitral awards for breach of natural justice, under Section 37 of the Act.

- In *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal* [2021] 1 MLJ 1, the Court had held that breach of the rules of natural justice does not extend to an arbitrator applying his own knowledge and expertise to issues that the parties have led evidence on, and which are the very issues which the arbitral tribunal has to deal with.
- In *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198, the Court departed from the Singapore approach by finding that Sections 37(1)(b)(ii) and 37(2)b)(ii) of the Act do not require prejudice to be shown in order for the Court to find that the arbitral tribunal had breached the rules of natural justice. However, the Court will require clear proof that the breach significantly affected the outcome of the arbitration. In Mr Foo's view, this is consistent with the courts' non-interventionist approach.

The Court's Power to Award Costs in Arbitrations

Ms Jamaludin explored the Court's powers under the Act, particularly Section 44, to award costs in arbitrations. For purposes of this discussion, the spotlight was put on appeals under Sections 15 and 18 of the Act.

Ms Jamaludin focused on the fact that if an appeal to set aside an award from the High Court is successful, there would effectively be no award even if there was a positive determination by the tribunal. Subsequently, the recovery of costs becomes an issue as parties are left in a situation where the tribunal has no jurisdiction to make an award on costs. Ms Jamaludin suggested that guidelines need to be provided to assist the courts in such circumstances, considering the myriad of ways in which costs are usually awarded in arbitration.

Drafting of Arbitration Agreements

The final presentation from the panel saw Ms Kassim approach the topic of discussion from a contract drafting standpoint.

Ms Kassim shared her experience as a practitioner and emphasised the role that lawyers play in ensuring that parties are aware of the benefits of arbitration and the intricacies that are frequently neglected. Details such as the seat of the arbitration and the constitution of the tribunal should not be taken for granted when entering into an arbitration agreement. In the same vein, several Malaysian precedents were shared with the audience, which showed that the courts are strict in

holding the parties to their arbitration agreements.

Conclusion

This panel effectively tackled many issues that affect modern-day arbitration in Malaysia as governed by the Act (as amended in 2018). Whether the current legislation is sufficient is a question worth further investigation and thought.

The key takeaway from this session is that there are certain roles that need to be played, not just at a legislative level, but also at the ground level, and that it is important that parties understand the spirit of the laws and apply them accordingly.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

References

?1 Arbitration Act 2005, as amended in 2018 (Act 646).

This entry was posted on Friday, October 14th, 2022 at 8:23 am and is filed under AIAC, Appeal, Costs, Domestic arbitration, Malaysia, Set aside an arbitral award
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.