Dispute Resolution 2021

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the nineteenth edition of *Dispute Resolution*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Israel, New York, Slovenia and Ukraine.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Martin Davies and Alanna Andrew of Latham & Watkins LLP, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

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1 | What is the structure of the civil court system?

The civil courts in Malaysia are divided into the superior courts (governed by the Courts of Judicature Act 1964) and the subordinate courts (governed by the Subordinate Courts Act 1948). The superior courts comprise three courts with different jurisdiction: the Federal Court, the Court of Appeal and the high courts. The subordinate courts consist of the sessions courts and the magistrates courts.

As of 24 April 2020, the Federal Court bench comprises 11 judges, namely the chief justice of the Federal Court, the president of the Court of Appeal, two chief judges of the high courts and seven Federal Court judges. The court of appeal bench has 24 judges, namely the president of the Court of Appeal and 23 Court of Appeal judges, and the high court bench has 95 judges, namely the chief judges of the high courts, 66 high court judges and 27 judicial commissioners.

The Federal Court is the apex court in the land and exercises both original and appellate jurisdiction. The Federal Court has original jurisdiction under articles 128(1) and (2) of the Constitution to determine any constitutional law issue. The Federal Court may, subject to leave being obtained first, hear appeals from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the high court in the exercise of its original jurisdiction. The Federal Court also has advisory jurisdiction in that the Yang di-Pertuan Agong (the head of state) may refer to the Federal Court for its opinion or advice as to the effect of any provision of the Constitution that has arisen or appears to him or her likely to arise, and the Federal Court shall pronounce its opinion in open court of any question so referred to it. All proceedings at the Federal Court are generally heard and disposed of by three or five judges.

The Court of Appeal exercises appellate jurisdiction and has the jurisdiction to hear and determine appeals from any judgment or order of any high court in any civil matter, whether it was made in the exercise of its original or of its appellate jurisdiction (section 67 of the Courts of Judicature Act 1964). Unless leave is granted, the Court of Appeal will only hear appeals where the amount or value of the subject matter of the claim (exclusive of interest) is 250,000 ringgit or above (section 68 of the Courts of Judicature Act 1964). All proceedings at the Court of Appeal are generally heard and disposed of by three judges.

The high court in Malaya and the high court in Sabah and Sarawak are high courts of coordinate jurisdiction (article 121 of the Constitution) and hear cases at first instance as well as appeals against decisions from the subordinate courts. The high court also hears appeals from a decision of a subordinate court in any civil matter where the amount in dispute or the value of the subject matter is above 10,000 ringgit, save where the matter involves a question of law (section 28 of the Courts of Judicature Act 1964). All proceedings at a high court are generally heard and disposed of before a single judge.

Within the high courts, various specialised courts have been set up, including the Intellectual Property Court, the Construction Court, the Family Court, the Admiralty Court, the Cyber Court and the Islamic banking (Muamalat) Court.

The Sessions Court judge has unlimited jurisdiction to try all actions and suits of a civil nature in respect of motor vehicle accidents, landlord and tenant and distress, all other actions and suits of a civil nature where the amount in dispute or the value of the subject-matter does not exceed 1 million ringgit, and all civil actions and suits for the specific performance or rescission of contracts, or for cancellation or rectification of instruments (section 65 of the Subordinate Courts Act 1984). The Sessions Court may grant an injunction and make a declaration, regardless of whether any other relief, redress or remedy is or could be claimed.

For civil matters, a first-class magistrate has the jurisdiction to try all actions and suits of a civil nature where the amount in dispute or value of the subject matter does not exceed 100,000 ringgit (section 90 of the Subordinate Courts Act 1984), whereas a second-class magistrate only has the jurisdiction to try original actions or suits of a civil nature where the plaintiff seeks to recover a debt or liquidated demand in money payable by the defendant, with or without interest, not exceeding 10,000 ringgit (section 92 of the Subordinate Courts Act 1984).

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

The Malaysian judicial system is adversarial in nature, where the parties or their counsel present evidence and arguments that advance their case. Judges generally adopt a passive role in proceedings and decide questions of fact and law based on the evidence and arguments advanced by the parties or their counsel. On 1 January 1995, Malaysia effectively abolished its jury system.

The Chief Justice of the Federal Court (the head of the Malaysian judiciary system) is appointed by the Yang di-Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Conference of Rulers (article 122B of the Federal Constitution). The process of appointment for the president of the Court of Appeal (the deputy head of the Malaysian judiciary system) and the chief judges of the high courts (the head of the high court in Malaya and the high court in Sabah and Sarawak, respectively) and all the other judges is the same, with the additional procedure of the Prime Minister consulting the Chief Justice of the Federal Court. Judicial commissioners may also be appointed by the Yang di-Pertuan Agong acting on the advice of the Prime Minister, after consulting the Chief Justice of the Federal Court.

To be qualified for appointment under article 122B as a judge of any of the superior courts, the candidate must be a citizen and an advocate of any of those courts, or a member of the judicial and legal service of

the federation or of the legal service of a state, for at least 10 years preceding his or her appointment. A judge holds office until he or she attains the age of 66 years and no later than six months after he or she attains that age, as the Yang di-Pertuan Agong may approve.

A Sessions Court judge is appointed by the Yang di-Pertuan Agong on the recommendation of the Chief Judge (section 59(3) of the Subordinate Courts Act 1948). A Sessions Court judge must be a member of the Judicial and Legal Service of the Federation (section 60 of the Subordinate Courts Act 1948).

A first-class magistrate in the Federal Territory is appointed by the Yang di-Pertuan Agong on the recommendation of the Chief Judge, whereas in all other states, they are appointed by the respective state authorities on the recommendation of the Chief Judge (section 78 of the Subordinate Courts Act 1948).

Similarly, a second-class magistrate is appointed by the Yang di-Pertuan Agong and respective state authorities without needing recommendation of the Chief Judge (section 79 of the Subordinate Courts Act 1948).

The Judicial Appointments Committee (JAC) was established with the effect of the Judicial Appointments Commission Act 2009, gazetted on 8 February 2009. The purpose of the JAC is to ensure that the process for the nomination, appointment and promotion of superior court judges is more transparent and comprehensive. The establishment of the JAC is a step towards improving the judiciary and strengthening and enhancing the integrity of the institution.

To promote diversity on the bench, candidates are chosen from differing backgrounds, ranging from academia to private practice and the public sector. The year 2019 was one of milestone achievements for female judges in Malaysia's apex court. Federal Court judge Tan Sri Tengku Maimun Tuan Mat, who was appointed as the 16th Chief Justice of the Federal Court on 2 May 2019, is the first woman to head the Malaysian judiciary. Dato' Rohana Yusuf, who was elevated to the position of the president of the Court of Appeal on 25 November 2019, is the first woman to hold the position since the inception of the Court of Appeal in 1994. For the first time, there are also six women judges in the Federal Court. Further, on 26 November 2018, Datuk Nallini Pathmanathan became the first Malaysian Indian woman to sit in the Federal Court.

Limitation issues

3 | What are the time limits for bringing civil claims?

Limitation periods for bringing civil claims are generally set out in the Limitation Act 1953. Pursuant to section 6(1)(a) of the Limitation Act 1953, an action founded on a contract or on tort cannot be brought after the expiration of six years from the date on which the cause of action accrued. This time limit applies similarly to actions to enforce a recognisance, actions to enforce an award, and actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture. Similarly, actions to recover rent have a limitation period of six years.

Limitation periods may be extended by fraud of the defendant or his or her agent concealing the right of action, or by a mistake. In those cases, the limitation period may not run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it (section 29 of the Limitation Act 1953).

Actions upon any judgment shall not be brought after 12 years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after six years from the date on which the interest became due. The limitation period for actions to recover land and recover principal secured by a charge or enforce a charge is also 12 years from the date on which the right of action accrued. Actions in respect of a fraudulent breach of trust or by a beneficiary under a trust to recover trust property from the trustee have no limitation period.

In respect of actions founded on tort where the time limit is six years, by virtue of the Limitation (Amendment) Act 2018, which came into effect on 1 September 2019, there has been an extension of three years from the date of knowledge of the person having the cause of action for negligence not involving personal injury and where the damage was not discoverable prior to the expiry of the statutory limitation period (section 6A of the Limitation Act 1953). Nevertheless, an action cannot be instituted 15 years after the cause of action accrued. There is also a special limitation period for individuals with a disability for cases under section 6A of the Limitation Act 1953, which is three years from the date the person ceased to be under a disability or died (section 24A of the Limitation Act 1953). Similarly, an action cannot be instituted 15 years after the cause of action accrued.

In the case of *Insun Development Sdn Bhd v Azali Bin Bakar* [1996] 2 MLJ 188, the Federal Court held that parties to a contract are free to regulate or modify their rights in the case of a breach thereof in such a manner as to postpone the date of accrual of their right to sue for damages. This would mean that parties are free to agree to suspend time limits.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

Generally, there are no steps that a party must take before commencing proceedings. Unlike the Civil Procedure Rules in the United Kingdom, the Malaysian Rules of Court 2012 do not impose any pre-action protocols on parties. Nevertheless, the parties may have agreed to certain pre-dispute negotiations or procedures in their contracts or agreements, which they will be contractually bound to observe and comply.

A party can apply for a pre-action discovery order under Order 24, rule 7A(1) of the Rules of Court 2012 before the commencement of proceedings, for the purpose of or with a view to identifying possible parties to any proceedings. In a pre-action discovery application, the applicant must:

- specify or described the documents in question;
- show that the documents are relevant to an issue arising or likely to be made in the proceedings or the identity of the likely parties to the proceedings or both by, where practicable, reference to any pleading served or intended to be served in the proceedings; and
- show that the person against whom the order is sought is likely to have or have had them in his or her possession, custody or power.

A plaintiff may also apply for a disclosure order against a third-party bank, pursuant to Order 24, rule 7A of the Rules of Court 2012. This application is also known as a Bankers Trust application and is used to ascertain information of bank accounts of fraudsters and other recipients of fraud monies. The overriding test in a Bankers Trust application is that there must be a viable case against the wrongdoers and the plaintiff requires discovery to facilitate his or her action.

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

In Malaysia, civil proceedings are commenced either by way of a writ of summons (writ) or an originating summons.

Where there is a substantial dispute of fact or where the plaintiff intends to seek summary judgment, a writ should begin the proceeding. Where there are no or few disputes of fact and the main issues are

questions of law, or involve the construction of any document where such questions are suitable for determination without the full trial of the action, the proceeding may be begun by originating summons.

All new cases commenced at the high court may now be filed electronically. In some subordinate courts in certain states where electronic filing is not yet available, filing must be done manually at the court registry.

Parties are notified of the commencement of proceedings upon being served with a sealed copy of the writ or originating summons, as the case may be. Where the defendant is a corporation, service is effected by leaving or sending by registered post a copy of either the writ or originating summons at the registered address of the company. Alternatively, service is effected by handing a copy of the writ or originating summons to the secretary or to any director or officer of the corporation. Where the defendant is an individual, service is effected by leaving a copy of the writ or originating summons with the defendant or by sending the same through pre-paid advice of receipt registered post addressed to the defendant's last known address. These modes of service would not be applicable where parties are suing based on a contract that specifically stipulates a different mode of service. In those circumstance, service must be effected by the method stipulated in the contract.

Where personal service is impracticable or cannot be effected, leave may be obtained from the court for the cause papers to be served by way of substituted service. The party applying for leave must prove that all reasonable efforts had been taken to attempt personal service. Generally, a substituted service order will require a notice to be published in one or two newspapers with national circulation, posted in the court premises or at the defendant's last known address.

For defendants outside Malaysia, an application must be made to the court for leave to serve out of the jurisdiction. For leave to be granted, the plaintiff must show, among other things, that he or she has a good arguable case for the relief claimed, that the defendant is in the particular jurisdiction outside Malaysia, and that Malaysia is the most appropriate forum to determine the dispute.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

In Malaysia, a civil claim can be commenced either by way of a writ or an originating summons, which are valid for six months beginning from the date of its issue.

On 31 January 2020, the Chief Judge of Malaya issued Practice Direction No. 1 of 2020 relating to case management of civil matters. Essentially, in a civil claim commenced by way of a writ, the typical procedure and timetable for the proceedings are as follows:

- Assuming an endorsed copy of the writ and statement of claim are duly served on the defendant, he or she has 14 days to enter appearance to defend the claim, and to file a statement of defence (and counterclaim, if any) within 14 days from the time limited for appearing or after the statement of claim is served on him or her, whichever is the later. Thereafter, the plaintiff has 14 days to file and serve a reply or reply and defence to counterclaim (if applicable).
- Pleadings are deemed to be closed at the expiration of 14 days after service of the reply or defence to the counterclaim (if no reply is served) or service of the defence (if no reply nor a defence to the counterclaim is served).
- Generally, the first case management will be fixed within 30 days from the filing of the writ. The second case management will take place within 14 days from the close of pleading. At the second case management, pretrial directions will be given, including, among others, directions relating to the filing of bundle of pleadings, bundle of documents, all interlocutory applications (if any) and other pretrial filings.
- The third case management will be fixed before the learned judge. Trial dates may be fixed, typically within six months from the date of filing of the writ, subject to the court's discretion to fix the trial dates on a later date.
- Practice Direction No. 1 of 2020 does not stipulate when a decision must be delivered. It is usual for parties to be given a month or two after the close of trial proceedings to file and exchange written submissions. A hearing date for oral submissions may be fixed, after which the court may deliver the judgment within one to three months.

In the case of a civil claim commenced by way of originating summons, a defendant has 21 days from the date of receipt of the sealed originating summons and the affidavit in support to respond by filing an affidavit in reply. Thereafter, the plaintiff will have another 14 days to respond to the defendant's affidavit in reply. Directions would usually be given by the courts during case management on timelines for further affidavits to be exchanged. The general rule is that the plaintiff would have the last say. According to Practice Direction No. 1 of 2020, the first case management date will be endorsed on the sealed originating summons, usually within 14 days from the date of filing of the originating summons. Interlocutory applications, if any, must be filed within 14 days from the first case management. A hearing date will be fixed within 30 days after all affidavits are exhausted.

Case management

7 | Can the parties control the procedure and the timetable?

The procedure and timetable for civil proceedings are generally set out in the Rules of Court 2012 and fixed by the courts. However, parties may propose appropriate procedure and suitable timelines for the court's consideration during case managements. The court has wide discretion and may make any order and directions for just, expeditious and economical disposal of proceeding.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Generally, parties have an obligation to preserve documents and other evidence pending trial. Pursuant to Order 24 rule 3 of the Rules Court 2012, the court may at any time in the proceedings order any party to give discovery by making and serving on any other party a list of the documents that are or have been in his or her possession, custody or power and may at the same time or subsequently also order him or her to make and file an affidavit verifying such a list and to serve a copy thereof on the other party. The list of documents is generally verified by way of an affidavit, which is filed and served on the other party.

The documents that parties may be ordered to discover are:

- documents on which the party relies or will rely on; and
- documents that could adversely affect his or her own case, adversely affect another party's case, or support another party's case.

The provisions in Order 24 of the Rules of Court 2012 are subject to any written law or any rule of law that authorises or requires the withholding of any document on the grounds that the disclosure of it would be injurious to the public interest. Privileged documents that are not subject to discovery include public interest privilege, affairs of state privilege and legal professional privilege.

The duty to provide discovery under any order continues throughout the proceedings until the proceedings in which the order was made are concluded (Order 24, rule 8A of the Rules of Court 2012).

Evidence – privilege

9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

There are generally three broad categories of legal privilege recognised in Malaysia: legal advice privilege, litigation privilege and without-prejudice privilege.

Legal advice privilege arises out of the relationship between a client and his or her lawyer. Legal advice privilege is codified in section 126 of the Evidence Act 1950, which provides that no advocate is permitted to disclose any communication made by the client to the advocate. This privilege is absolute and can only be waived by the privilege holder, namely the client (*Dato' Anthony See Teow Guan v See Teow Chuan & Anor* [2009] 3 MLJ 14 (FC)). The exception is where the communication is made in furtherance of any illegal purpose, crime or fraud.

A breach of section 126 is tantamount to a breach of a principle of fundamental justice that would entitle an aggrieved party to commence an action for an order to 'safeguard the confidentiality of the client-solicitor communication' (*Tan Chong Kean v Yeoh Tai Chuan & Anor* [2018] 2 MLJ 669 (FC)).

The high court in the case of *Toralf Mueller v Alcim Holding Sdn Bhd* [2015] MLJU 779 (HC) held that section 126 does not apply to communications between in-house counsel and his or her employer.

Litigation privilege applies to communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with pending or contemplated litigation. For litigation privilege to be established, a two-fold test must be satisfied: whether litigation was pending or apprehended when the information or document was obtained; and whether litigation was the dominant purpose for the preparation of the document (*Wang Han Lin v HSBC Bank Malaysia Bhd* [2017] 10 CLJ 111 (CA)).

Without-prejudice privilege applies to communications, whether oral or written, that were made in the course of settlement negotiations. When used correctly, without-prejudice communications can render a statement or admission made by one party inadmissible as evidence in court proceedings. That is, the communications by that party cannot be used against them in a manner that would cause prejudice to that party's case.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

During a pretrial case management, the court may give pretrial directions to parties pursuant to Order 34, rule 2 of the Rules of Court 2012 directing parties to exchange their evidence-in-chief in the form of written statements of factual witnesses and documents that will be relied on or referred to in the course of the trial by any party, including documents referred to in the witness statements. The court would also likely direct expert evidence to be given in a written report signed by the expert and exhibited in an affidavit sworn to or affirmed by him or her testifying that the report exhibited is his or hers and that he or she accepts full responsibility for the report (Order 40A of the Rules of Court 2012). A party may also apply for leave of the court to put to an expert instructed by another party written questions about his or her report.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

The evidence-in-chief of each witness that has been exchanged before trial can only be admitted as evidence if the witness attends the trial for oral cross-examination. Order 38, rule 1 of the Rules of Court 2012 provides that, as a general rule, witnesses in a writ action are to give evidence orally for examination. In this regard, witnesses are first examined-in-chief, then cross-examined and finally re-examined.

Expert witnesses also generally must give oral evidence on issues on which the expert witnesses of the respective parties are unable to agree. Where the experts reach agreement on an issue during the course of their discussions, the parties may agree to be bound by the agreement and hence remove the issue from contention and from the areas on which the experts may be cross-examined (Order 40A, rule 5 of the Rules of Court 2012).

Interim remedies

12 | What interim remedies are available?

The court has powers to grant a wide range of interim remedies, including:

- interim injunctions: orders directing a defendant to do or refrain from doing something pending the trial where there is a serious question to be tried, damages are not adequate remedy and the balance of convenience lies in favour of granting an injunction;
- *Anton Piller* orders or search orders: mandatory injunctions requiring a defendant to provide access to its premises to allow documents and materials to be removed and preserved pending trial, to preserve the subject matter of a cause of action and of related documents;
- *Mareva* injunction or freezing orders: orders preventing the defendant from dissipating assets so as not to frustrate any judgment that the plaintiff may eventually obtain against the defendant;
- interim payments: orders requiring a party to pay a sum of money into court on account of damages, debts or other sums that he or she may be held liable to pay the other party. A party may also be required to pay a portion of the sum claimed by the other party if the court is satisfied that, if the action proceeded to trial, the other party would obtain judgment for substantial damages against that party;
- *quia timet* injunction: injunctions to prevent an injury from occurring, which will only be granted if the plaintiff can show a strong probability that unless restrained, the defendant will do something that will cause the plaintiff irreparable harm;
- appointment of provisional liquidator: orders appointing provisional liquidators at any time after the presentation of a winding-up petition to preserve the assets of the company pending the hearing of the petition in company winding-up proceedings; and
- appointment of receivers and managers: orders appointing receivers and managers when it appears just and appropriate to do so to receive, manage or preserve property, or to restrain other parties from taking that property pending the trial.

Remedies

13 | What substantive remedies are available?

Common substantive remedies available to a plaintiff include:

- damages, which are generally compensatory in nature, to compensate the loss suffered by the plaintiff as a result of the defendant's actions. Exemplary or punitive damages are additional damages

awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he or she has acted with a 'contumelious disregard' for the rights of the plaintiff. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the plaintiff (*Sambaga Valli K R Ponnusamy v Datuk Bandar Kuala Lumpur & Ors & Another Appeal* [2018] 1 MLJ 784 (CA));

- declarations, which may be made under the discretionary power of the courts;
- injunctions, which may be granted to compel or restrain conduct on the part of a defendant pending the completion of a trial;
- specific performance – to require the defendant to perform the terms of the contract that were breached and are often awarded where damages would not be an adequate remedy; and
- account – to recover profits taken as a result of a breach of duty.

Interests are incurred on judgment debts at the applicable rate provided for in the Rules of Court 2012. Pursuant to Practice Direction No. 1 of 2012, the present prescribed rate of interest is 5 per cent per annum.

Enforcement

14 | What means of enforcement are available?

There are various means of enforcement under the Rules of Court 2012 to ensure that parties comply with judgments or orders.

For the enforcement or execution of judgment or order for the payment of money, the following means may be adopted:

- writ of execution, which includes a writ of seizure and sale (for judgment sum), a writ of possession (for judgment for possession of immovable property) and a writ of delivery (for judgment or delivery of movable property);
- the appointment of a receiver or a receiver and manager;
- examination of the judgment debtor where the judgment debtor will be ordered to attend court for oral examination as to his or her assets and means under section 4(1) of the Debtors Act 1957;
- garnishee order, which compels a third party who owes money to the judgment debtor to pay the said sum directly to the judgment creditor;
- charging order in respect of shares held by the judgment debtor; and
- bankruptcy and winding-up proceedings.

For failure to comply with judgments and orders to do or abstain from doing an act, the court may make an order for committal under Order 45, rule 5 of the Rules of Court 2012.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Generally, the public is allowed to attend court hearings in Malaysia, which are conducted in open court. These include trials, appellate court hearings, hearings of judicial review applications and hearings of winding-up petitions. On the other hand, hearings of originating summons and notices of application are heard in chambers. Proceedings may also be held in camera, that is, without the presence of the public or the press, where it is expedient in the interests of justice, owing to public safety or propriety, or other sufficient reasons.

Court documents, such as pleadings and other cause papers, are generally available to the public. A member of the public may have access to cause lists and court documents by conducting an online file search if he or she has the relevant case number. However, there may be certain cases where the court files are sealed owing to reasons of confidentiality or secrecy. In these circumstances, the court files will not be available to the public for easy access.

Costs

16 | Does the court have power to order costs?

The court has full discretion to order costs and has full power to determine by whom and to what extent the costs are to be paid.

The general position is that costs are to be paid by the losing party to the winning party. In assessing the costs to be paid, the court will consider all relevant circumstances and, in particular, the factors set out in Order 59, rule 16(1) of the Rules of Court 2012, which include the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved; the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor or counsel; the number and importance of the documents, however brief, prepared and used; and where money or property is involved, its amount or value.

A plaintiff may be ordered to provide security for costs in civil proceedings if, among others, he or she is ordinarily resident out of the jurisdiction or is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he or she will be unable to pay the costs of the defendant if ordered to do so (Order 23, rule 1 of the Rules of Court 2012).

Previously, section 351 of the Companies Act 1965 (now repealed) allowed for security for costs to be ordered against a company if it appears by credible testimony that there is reason to believe that the company cannot pay the costs of the defendant. Section 351 was not carried forward to the new Companies Act 2016. The high court in the case of *Customer Loyalty Solutions Sdn Bhd (in liquidation) v Advance Information Marketing Bhd & Anor* [2017] MLJU 1919 (HC) noted that section 351 of the Companies Act 1965 is no longer found in the Companies Act 2016 and held that Order 23, rule 1 of the Rules of Court 2012 may be applied for an order for security for costs. In addition to this, the court retains its inherent jurisdiction to grant security for costs, if required, to achieve the justice of the case.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Section 112 of the Legal Profession Act 1976 expressly prohibits any advocate and solicitor from entering into an arrangement or agreement where the advocate and solicitors' entitlement to fees is conditional on the success of the suit, action or proceeding. An advocate or solicitor is also prohibited from purchasing (or agreeing to purchase) directly or indirectly any interest that is the subject matter of the suit, action or proceeding. Those engagements or appointments are illegal and against public policy, and therefore, void under section 24 of the Contracts Act 1950 (*Industrial Concrete Products Berhad v Huang Khairun Kumar & Associates* [2014] 7 CLJ 52 (CA)). Rule 27 of the Legal Profession (Practice and Etiquette) Rules 1978 also prohibits an advocate and solicitor from appearing in any matter in which he or she is directly financially involved.

While section 112 of the Legal Profession Act 1976 applies only to advocates and solicitors in West Malaysia, it must be pointed out that the common law doctrine of maintenance and champerty has not been abolished in Malaysia, and as such, litigation funding arrangements are unenforceable as a matter of public policy (*Quill Construction Sdn Bhd v Tan Hor Teng & Anor* [2006] 2 CLJ 358 (HC)).

Although there are no express statutory provisions prohibiting those arrangements (for example, there is no provision in the Sarawak Advocate Ordinance), the common law doctrine against maintenance and champerty is applicable to declare an agreement void on the ground of public policy (*Mastika Jaya Timber Sdn Bhd v Shankar Ram Pohumall (No 2)* [2010] 10 CLJ 312 (HC)).

Sections 112 and 116 of the Legal Profession Act 1976 permit an advocate and solicitor to enter into a written agreement for costing contentious business. Rule 11 of the Legal Profession (Practice and Etiquette) Rules 1978 sets out the factors to be taken into consideration.

Third-party funding arrangements are not allowed in Malaysia. A Third-Party Funding Bill 2018 was proposed to allow third-party funding for international arbitrations seated in Malaysia or international arbitration-related court proceedings. However, this bill was not ultimately tabled in parliament.

Litigation may be funded if a party is financially eligible for legal aid rendered by the government's Legal Aid Department. Legal aid services provided include legal aid in civil court proceedings relating to married women, children, probate, letters of administration, tenancy and consumer claims, legal advice on all matters, mediation services and legal companion services. The Bar Council Legal Aid Centre also provides legal services and advice for those who cannot afford legal services through its various programmes, such as the Walk-in Clinic, and joint programmes with other non-government organisations, such as the All Women's Action Society Malaysia, Women's Aid Organisation and United Nation High Commissioner for Refugees, Tenaganita.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Legal expenses insurance or legal protection insurance are not commonplace in Malaysia. However, liability insurance, also known as business and commercial insurance, is available to protect the insured if sued for claims that come within the coverage of the liability insurance policy.

There are many types of liability insurance, including public liability insurance, product liability insurance, professional indemnity insurance, directors' and officers' liability insurance, and employers' liability insurance.

Under section 289 of the Companies Act 2016, a company is now permitted, with the prior approval of its Board, to effect insurance to cover an officer or auditor of the company against any civil liability for any act or omission in his or her capacity as a director or officer or auditor; and for any costs incurred by that officer or auditor in defending or settling any claim or proceeding relating to any such liability. However, that insurance may not be effected by the company in respect of civil or criminal liability arising from a director's breach of duty under section 213 of the Companies Act 2016.

Professional indemnity insurance is typically mandatory for professionals who are regulated by their respective professional bodies, such as the professions of lawyers, accountants, architects, doctors, engineers and surveyors. The extent of coverage will depend on the policies taken out.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Malaysia does not have a broad process for class action. Class action in Malaysia is generally known as representative action. The formal rules that apply to a representative action in Malaysia is Order 15, rule 12 of the Rules of Court 2012, which provides that proceedings may be filed by or against one or more persons as representing numerous persons who have the same interest in the proceedings.

The sole test to apply is that of 'the same interest' in one cause or matter. The Court of Appeal in *Vellasamy Pennusamy & Ors v Gurbachan Singh Bagawan Singh & Ors* [2012] 2 CLJ 712 (CA) laid down the prerequisites for invoking Order 15, rule 12 of the Rules of Court 2012, which are:

- there must be numerous persons with the same common interest arising out of the same contract or the same grant or claim pertaining to the same subject matter;
- the reliefs sought by these numerous persons must not be personal but beneficial to the class as a whole; and
- the plaintiffs and those represented in it must be members of a class having a common interest and a common grievance and the reliefs sought are beneficial to all of them.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Parties may appeal against findings of both fact and law, or against the court's exercise of its discretion. Appellate courts are generally reluctant to reverse findings of fact, particularly where those findings depended on the judge's view of the credibility of the witnesses who gave oral evidence before the court of first instance.

An appeal from a decision of a subordinate court in a civil action shall only lie to the high court where the amount in dispute or the value of the subject matter exceeds 10,000 ringgit, except where the appeal involves a question of law or where it relates to the maintenance of wives or children.

A party aggrieved with any judgment or order of the high court may appeal as of right to the Court of Appeal, subject to certain exceptions: for instance, where leave of the Court of Appeal is required if the amount or value of the subject-matter of the claim (exclusive of interest) is less than 250,000 ringgit.

The Federal Court may hear appeals from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the high court in the exercise of its original jurisdiction. However, leave of the Federal Court must first be obtained. Leave will only be granted if the matter involves a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage (section 96 of the Courts of Judicature Act 1964). The Federal Court may also hear appeals from any decision as to the effect of any provision of the Constitution, including the validity of any written law relating to any such provision.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

A foreign judgment may be recognised and enforced under the Reciprocal Enforcement of Judgements Act 1958 (REJA) or under common law by commencing an action on the judgment itself. A foreign judgment can generally be registered if it is final and conclusive between the parties,

is for a sum of money and applicable procedural requirements are complied with. A foreign judgment may be enforced as if it were a judgment of the Malaysian courts only after it has been registered.

REJA applies only to judgments made by superior courts from the reciprocating countries as listed in the First Schedule of the Act, namely the United Kingdom, Hong Kong, Singapore, New Zealand, Sri Lanka, India (excluding certain states) and Brunei.

An application to register foreign judgments must be filed within six years of the date of the judgment or any appeal decision thereof.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

The procedure for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions is governed by Order 66, rule 1 of the Rules of Court 2012. An application may be made to the high court for an order for the examination of witnesses and for attendance and production of documents, for use in foreign proceedings. The application will be made ex parte by a person duly authorised to make the application on behalf of the foreign court or tribunal and must be supported by an affidavit exhibiting the letter of request, certificate or other document evidencing the desire of the foreign court or tribunal to obtain for the purpose of foreign proceedings the evidence of that witness. The deposition of that witness shall be sent to the registrar who will send the deposition, together with a certificate with the seal of the high court to the minister or any appropriate person, for transmission to the foreign court or tribunal.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

The Malaysian Arbitration Act 2005 is largely modelled on the UNCITRAL Model Law on International Commercial Arbitration 1985.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

The formal requirements for an enforceable arbitration agreement are set out in section 9 of the Arbitration Act 2005. An arbitration agreement is defined as 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not'.

An arbitration must be in writing. Following the amendments to section 9 of the Arbitration Act 2005 by virtue of the Arbitration (Amendment) (No. 2) Act 2018, an arbitration agreement is regarded to be in writing if:

- its content is recorded in any form, regardless of whether the agreement or contract has been concluded orally, by conduct or by other means; or
- it is contained in an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

An electronic communication that the parties make by means of data message is also regarded as an arbitration agreement in writing if the information contained therein is accessible so as to be usable for subsequent reference. 'Data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy.

An arbitration agreement should contain information such as the scope of the disputes to be referred to arbitration, the number of arbitrators and procedure for the appointment of arbitrators, whether the arbitration is to be administered by an arbitral institution or otherwise, the seat and language of the arbitration and the governing law of the arbitration agreement.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

Generally, parties are free to determine the number of arbitrators and the procedure for appointing the arbitrators.

If the arbitration agreement is silent on the matter and the parties fail to determine the number of arbitrators, under section 12 of the Arbitration Act 2005, the arbitral tribunal shall:

- in the case of an international arbitration, consist of three arbitrators; and
- in the case of domestic arbitration, consist of a single arbitrator.

Pursuant to section 13 of the Arbitration Act 2005, where the parties fail to agree on the procedure for appointing arbitrators, in the case of a panel of three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator as the presiding arbitrator. At any point, if arbitrators are not appointed within the stipulated time period, either party may apply to the Director of the Asian International Arbitration Centre (Malaysia) for such appointment. The procedure is the same in an arbitration with a single arbitrator.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

Parties are free to choose and subject to pre-agreed criteria or qualifications in their arbitration agreements, the parties' available pool of candidates is not confined to arbitrators in Malaysia.

Parties may also select arbitrators from various panels of arbitrators maintained by arbitral institutions around the world, including the Asian International Arbitration Centre (AIAC), which provides a diverse list of arbitrators available locally and abroad (together with their qualifications and experiences) to meet the needs of complex arbitrations.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Section 21 of the Arbitration Act 2005 provides that the parties are free to agree on the procedure to be followed in conducting arbitral proceedings. Failing such an agreement, the tribunal may, subject to the provisions of the act, conduct the arbitration in a manner it considers appropriate. This provision in the act is in line with the principle of party autonomy and the ability of parties to design the procedural rules according to their needs.

The procedure or procedural rules agreed upon by parties must be consistent with the public policy of Malaysia; otherwise, the eventual arbitral award may be liable to be set aside, or enforcement refused (section 37 of the Arbitration Act 2005).

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Section 8 of the Arbitration Act 2005 provides that no court may intervene in matters governed by the act, except where so provided in the act. The need to respect party autonomy in the arbitral process with minimal court intervention is a fundamental concept under Malaysian law. The court may intervene in limited circumstances expressly provided in the act, including the:

- appointment of arbitrators, where the director of the AIAC fails to do so within 30 days from the request;
- determination on any challenge made by a party to the appointment of an arbitrator;
- determination of the jurisdiction of the arbitral tribunal upon an appeal by a party;
- power to issue interim measures in relation to arbitration proceedings, including to maintain or restore the status quo pending the determination of the dispute, to preserve assets, to preserve evidence or to provide security for the costs of the dispute;
- power to order the attendance of a witness to give evidence or, where applicable, produce documents;
- determination of any preliminary question of law arising in the course of the arbitration; and
- extension of time for commencing arbitration proceedings

In the high court case of *WRP Asia Pacific Sdn Bhd & Anor v TAEL Tijari Partners Ltd & Ors* [2019] MLJU 1244 (HC), it was held that the court has the powers to vary or set aside the interim measures if there is a change of circumstances justifying the making of such an order. The fact that the interim measures, in this case, prohibitory injunction orders, were made after an inter partes hearing does not mean that the court cannot vary or discharge the same if there is suppression of material facts or an intentional action to mislead the court.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Pursuant to section 19 of the Arbitration Act 2005, unless otherwise agreed by the parties, the arbitral tribunal may at the request of a party grant interim measures. The arbitral tribunal may grant an interim measure, whether in the form of an award or in another form, at any time prior to the issuance of the final award, to order a party to:

- maintain or restore the status quo, pending the determination of the dispute;
- take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;
- provide a means to preserving assets out of which a subsequent award may be satisfied;
- preserve evidence that may be relevant and material to the resolution of the dispute; or
- provide security for costs of the dispute.

Award

30 | When and in what form must the award be delivered?

Pursuant to section 33 of the Arbitration Act 2005, an award shall be made in writing and signed by the sole arbitrator or, where there is more than one arbitrator, by a majority of the members of the arbitral tribunal.

An arbitral award must state the reasons for the award unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms, and must state its date and the seat of the arbitration. After an award has been made, a copy of the signed award shall be delivered to each party.

The Arbitration Act 2005 does not prescribe a time limit within which an award should be rendered. However, if the arbitration is administered under the AIAC Arbitration Rules 2018, rule 12 requires the arbitral tribunal to submit its draft of the final award to the Director of AIAC within three months from the close of proceedings for a technical review. Where the AIAC Fast Track Arbitration Rules 2018 is adopted, the arbitral tribunal must publish its award within 90 days from the date when the proceedings were declared closed.

If the time for making an award is limited by the arbitration agreement, the high court may, unless otherwise agreed by the parties, extend the time. An application may be made by the arbitral tribunal with notice to the parties or by any party to the proceedings with notice to the arbitral tribunal and the other parties (section 46 of the Arbitration Act 2005).

Appeal

31 | On what grounds can an award be appealed to the court?

There are no provisions in the Arbitration Act 2005 allowing for appeal of an arbitral award. Parties may apply to set aside the award on the grounds set out in section 37 of the Arbitration Act 2005 or apply to resist the recognition or enforcement of the award under section 39 of the Arbitration Act 2005.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Malaysia is a signatory to the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), which came into force on 3 February 1986 in Malaysia.

The provisions on recognition and enforcement of arbitral awards are contained in sections 38 and 39 of the Arbitration 2005 Act, read with Order 69, rule 8 of the Rules of Court 2012, which provide for a two-stage process (*CTI Group Inc v International Bulk Carriers SPA* [2017] 9 CLJ 499 (FC)):

- the first stage, an ex parte proceeding: an originating summons must be filed with an affidavit exhibiting the duly authenticated original or duly certified copy of the award, and the original or duly certified copy of the arbitration agreement. An ex parte order giving permission to enforce an arbitral award is made at this stage; and
- the second stage, an inter partes proceeding: an application to set aside the ex parte order must be made within 14 days after service of the ex parte order on the party against whom the order is made.

The two-stage process does not permit a party seeking to set aside the ex parte order to set it aside under section 38 – it must be applied for under section 39 of the Arbitration Act 2005, which sets out limited grounds on which recognition or enforcement may be refused by the court (*CTI Group Inc v International Bulk Carriers SPA* [2017] 9 CLJ 499 (FC)).

Malaysia is also a signatory to the Convention on the Settlement of Investment Disputes (the ICSID Convention) and the ASEAN Comprehensive Investment Agreement between members of the Association of Southeast Asia Nations.

Costs

33 | Can a successful party recover its costs?

Parties are entitled to recover the costs and expenses of an arbitration. They are free to agree on how costs are to be paid, failing which section 44 of the Arbitration Act 2005 gives the arbitral tribunal the discretion to

determine whether costs should follow the outcome of the arbitration, or for each party to bear its own costs.

Article 40(2) of the UNCITRAL Arbitration Rules, read with rule 13 of the AIAC Arbitration Rules 2018, provides that the term 'costs' includes only:

- the fees of the arbitral tribunal;
- the reasonable travel and other expenses incurred by the arbitrators;
- the reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
- the reasonable travel and other expenses of witnesses to the extent those expenses are approved by the arbitral tribunal;
- the legal and other costs incurred by parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; or
- any fees and expenses of the appointed authority, including the expenses reasonably incurred by the AIAC in connection with the arbitration, the administrative fees of the AIAC and the costs of the facilities made available by the AIAC.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 What types of ADR process are commonly used? Is a particular ADR process popular?

The ADR processes that are commonly used in Malaysia are mediation and adjudication.

Mediation

Mediation is a voluntary process governed by the Mediation Act 2012, in which an impartial third party, for example the mediator, facilitates communication and negotiation between parties to assist them in reaching an agreement regarding a dispute. In mediation, the parties themselves retain control over the solution to their dispute. The mediator acts independently and impartially and does not impose a resolution or make a decision that is binding on the parties. All mediation proceedings are private and confidential. Any disclosure, admission, concession or communication made during the mediation process shall be strictly 'without prejudice' and may only be disclosed with the consent of the parties.

The types of cases that are appropriate for settlement by mediation include claims for personal injuries and other tortious acts, claims for defamation, matrimonial disputes, commercial disputes, contractual disputes and intellectual property cases. Matters relating to constitutional law, public law and criminal law are not suitable for mediation.

There are two avenues that parties can consider when attempting mediation: judge-led mediation and ad hoc mediation, where the dispute will be referred to a private mediator.

The court-annexed mediation programme is a free service where judges act as mediators to aid in resolving disputes between litigation parties. This initiative is supported by Practice Direction No. 4 of 2016 issued by the Chief Justice of Malaysia, which took effect on 15 July 2016, directing that all judges and registrars may, at pretrial case management stage, give directions to parties to facilitate the settlement of the matter before the court by way of mediation to encourage parties to arrive at an amicable settlement without going through or completing a trial or appeal.

Parties may also opt for ad hoc mediation. There are various organisations that offer private mediation services in Malaysia, such as the Asian International Arbitration Centre (AIAC); the Malaysian Mediation Centre (MMC), which is overseen by the Malaysian Bar; and the Securities Industries Dispute Resolution Centre (SIDREC), which focuses mainly on securities disputes.

On 7 August 2019, the United Nations (UN) Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) was signed in Singapore by 46 UN members – on the day it opened for signatures. Malaysia was among the first signatories to the Singapore Convention on Mediation. There are now 51 signatories to the Singapore Convention on Mediation. The Convention will enable and facilitate the enforcement of mediated settlement agreements among the signatory states, in a manner similar to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) for arbitral awards. The Convention entered into force on 12 September 2020, six months after the deposit of the third ratification instrument.

Adjudication

Adjudication is a statutory dispute resolution mechanism under the Construction Industry Payment and Adjudication Act 2012 (CIPAA) to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication and to provide remedies for the recovery of payment in the construction industry. CIPAA applies to every construction contract made in writing relating to construction work carried out wholly or partly within Malaysia, including construction contracts entered into by the government. However, CIPAA does not apply to construction work in respect of a building that is less than four storeys high and that is wholly intended for occupation.

The adjudication process is meant to be quick and speedy and the statutory timelines set out in the CIPAA must be strictly adhered to. An adjudication decision is binding unless it is set aside by the high court; the subject matter of the adjudication decision is settled by written agreement between the parties; or the dispute is finally settled by arbitration or the court.

On 16 October 2019, the Federal Court in two landmark cases, *Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd (and Another Appeal)* [2019] 7 AMR 348 and *Ireka Engineering & Construction Sdn Bhd v PWC Corporation Sdn Bhd and two other appeals* [2019] 7 AMR 309, held that CIPAA applies prospectively to contracts entered into after CIPAA came into force on 15 April 2014. It is therefore clear that CIPAA does not apply to construction contracts made before CIPAA came into operation and that parties to such contracts are not entitled to resort to statutory adjudication proceedings to resolve payment disputes.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

For court litigation, Practice Direction No. 4 of 2016 states that all judges of the high court and its deputy registrars and all judges of the Sessions Court and Magistrates and their assistant registrars may, at pretrial case management stage, give directions to parties to facilitate the settlement of the matter before the court by way of mediation. While judges may encourage parties to settle their disputes at any stage of the proceedings, there is no mandatory requirement for parties to do so, and the court would unlikely compel the parties to participate in an ADR process.

As for arbitration, unless expressly provided in the arbitration clause that mediation or other ADR processes must be pursued or attempted as a condition precedent to the referral of any dispute to arbitration, the parties are not required to consider ADR before or during proceedings.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

The e-Review System, which was first implemented at the Federal Court and the Court of Appeal in October 2018 and subsequently extended to some of the high courts in stages, has been expanded to all high courts and subordinate courts in Peninsular Malaysia that operate the case management system (CMS) with effect from 2 January 2020. The e-Review System is an online forum within the e-Court System that enables judicial officers and legal representatives in a case to conduct case management via exchange of written messages without having to attend court. The objectives of this system are to reduce in-person court appearances for case managements before the registrars at the courts and to save the time and expense of having to attend court in person to deal with preliminary matters. This system has revolutionised the manner in which case managements are conducted and have moved away from conventional case management. With the e-Review System, court registrars are able to conduct more case managements in a single day compared with conventional case management.

UPDATE AND TRENDS

Recent developments

37 Are there any proposals for dispute resolution reform? When will any reforms take effect?

Selected key developments of the past year are set out below.

Arbitration

On 1 July 2019, the Federal Court in *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1 (FC) granted an application by a non-party to an arbitration agreement seeking to restrain the parties to the agreement from taking part in an ongoing arbitration to allow the non-party to attempt to enforce its proprietary rights through litigation. The Federal Court held that the Court of Appeal misdirected itself in rejecting the *Keet Gerald Francis* test and applying the more stringent test laid down in the English high court decision in *J Jarvis v Blue Circle Dartfort Estates* [2007] EWHC 1262 (TCC), as the *J Jarvis* case is not applicable to anti-arbitration applications applied by non-parties to arbitration proceedings.

The Federal Court held that sections 8 and 10 of the Arbitration Act 2005 did not apply to a non-party to the arbitration agreement or to the arbitration itself. The Federal Court opined that the primary consideration was to determine the 'fairest approach' for all parties and that it 'must not result in any party suffering a severe disadvantage and for the ends of justice to be met, the benefits must outweigh the advantage'. It was held that priority should be given for the matter to be dealt with by the court because of: the 'clear and unarguable similarities and significant overlap' between the suits and the arbitration proceedings where costs would also be duplicated in the event that both proceeded simultaneously, and the suits were already at the trial stage; and the 'significant degree of multiplicity, duplication and overlap of issues in the arbitration and the suits' ought to be avoided and circumvented to prevent the risk of inconsistent findings, the risk of delay and the risk of increased costs. The Federal Court decided unanimously to issue an anti-arbitration injunction restraining the parties to the arbitration agreement from taking part in the ongoing arbitration.

Jaya Sudhir was referred to in two recent High Court decisions. The first is the High Court case of *Felda Investment Corporation Sdn Bhd v. Synergy Promenade Sdn Bhd* [2020] MLJU 1465, where *Jaya Sudhir* was distinguished on the facts as the plaintiff and applicant for the injunction was a party to the arbitration agreement and the arbitral proceedings. The court adopted the principle as established in *Jaya Sudhir* and applied the higher test and threshold required for an anti-arbitration injunction. The second case is the High Court case of *Federal Land Development Authority & Anor v. Tan Sri Haji Mohd Isa bin Dato Haji Abdul Samad & Ors* [2020] MLJU 1465, where the plaintiffs and applicants were not parties to the arbitration agreement or the arbitral proceedings. The High Court followed *Jaya Sudhir* and applied the *Keet Gerald Francis* test.

On 27 March 2020, the Federal Court 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*, Civil Appeal No: 02(f)-115-12/2018(W) clarified that only the dispositive sections of arbitral awards will be enforced by the courts under section 38 of the Arbitration Act 2005. As a court of enforcement, the court is not required to go behind the award and to understand the arbitral tribunal's reasoning, which would only be relevant, if at all, to a court of merits that is considering the merits of the award, for example, in a setting aside application. This is the same approach adopted by courts in other jurisdictions, such as the United Kingdom, Australia and Singapore. The Federal Court also stated that the registration of the entire award would undermine the confidentiality of the arbitration proceedings, which comprise the cornerstone of arbitration.

On 27 August 2020, the Federal Court in *Pancaran Prima Sdn Bhd v. Iswarbena Sdn Bhd* [2020] MLJU 1273 held that an Arbitrator can rely on his own knowledge and expertise when the Arbitrator makes a key finding in an arbitral award. In doing so, the Federal Court relied on section 21(3)(b) of the Arbitration Act 2005 which expressly provides that the power conferred on the arbitral tribunal shall include the power to draw on its own knowledge and expertise. This is a power conferred by statute. The Federal Court also recognised the difference between arbitrations involving 'a lay arbitrator' and an arbitrator with certain expertise and experience in a particular field. In this case, the Arbitrator was not a mere lay arbitrator, he was therefore held to be entitled to draw on his expertise and experience in determining this dispute and need not inform parties that he was doing so.

Also, on 27 August 2020, the Federal Court had in *Master Mulia Sdn Bhd v. Sigur Rus Sdn Bhd* [2020] 19 CLJ 213 clarified the interpretation of section 37 of the Arbitration Act 2005, essentially whether the High Court, in exercising jurisdiction under section 37 of the Arbitration Act 2005, is bound to set aside an arbitration award as a matter of course, if any of the grounds of challenge under section 37(1) or (2) is made out other than a complaint falling under section 37(3); and whether, where the complaint under section 37 of the Arbitration Act 2005 is only in respect of one of three principal issues before the arbitrator or where the case is made out only in respect of one out of three issues, the High Court is obliged as a matter of law under section 37 to set aside the whole award. The Federal Court answered both questions in the negative. The court held that the Singapore position (which requires the applicant to show 'actual or real prejudice' in that it must be established that the breach of the rules of natural justice must, at the very least, have actually altered the final outcome of the arbitral proceedings in some meaningful way) is not applicable in Malaysia, where prejudice is not required to be established. The court opined that although the court's discretion to set aside an award under section 37(1) is unfettered, it must nevertheless be exercised with regard to the policies and objectives underpinning the Arbitration Act 2005. In particular, due cognisance must be taken of the purposes of encouraging arbitration as a method of dispute resolution and facilitating the recognition and enforcement of arbitral awards. Nevertheless, on the facts of the case,

the Federal Court found that the Court of Appeal was correct in setting aside the entire award on the basis that the breach had materiality and causative effect on the outcome of the arbitration.

On 8 October 2020, the Court of Appeal in *Ken Grouting Sdn Bhd v. RKT Nusantara Sdn Bhd* [2021] 2 CLJ 173, in a landmark case on this point of law, held that rules of arbitration which stipulate that an award must be delivered by a certain date are time-sensitive and affect the mandate of the arbitrator and therefore his or her jurisdiction. Even if the rules of arbitration enable the arbitrator to unilaterally extend the time to deliver the award subject to parties being notified, such rules are equally time-sensitive and will also have bearing on the arbitrator's mandate and jurisdiction. Further, parties do not have the burden to raise any objections after the deadline of the delivery of the award had passed and before the award is delivered. The arbitrator's mandate and jurisdiction will automatically cease after the passing of the deadline for the award to be delivered and the failure of a party to raise an objection cannot amount to a waiver of their rights whatsoever. Such an award is not only liable to be set aside but is also a nullity and remains so unless an order to extend time is obtained from the High Court by the parties or the arbitrator pursuant to section 46 of the Arbitration Act 2005.

New corporate rescue mechanisms in Malaysia

The Companies Act 2016 brought changes to the corporate insolvency regime in Malaysia through the introduction of corporate voluntary arrangement (CVA) and judicial management (JM), in addition to the existing scheme of arrangement mechanism.

The Court of Appeal case of *CIMB Islamic Bank Bhd v Wellcom Communications (NS) Sdn Bhd & Anor* [2019] 4 CLJ 1 (CA) is the first appellate decision on the JM mechanism. The Court of Appeal set aside the stay of the order refusing JM and held that the respondent company (whose JM application has been dismissed) is not allowed to obtain a second bite at the cherry for statutory moratorium protection under section 410 of the Companies Act 2016. The Federal Court was of the view that this would, in jurisprudential terms, be an abuse of process.

The High Court in *Barakah Offshore Petroleum Berhad & Anor v Mersing Construction & Engineering Sdn Bhd & Ors* [2019] MLJU 338 allowed Barakah's creditors' application to set aside an ex parte restraining order under a scheme of arrangement obtained by Barakah under section 368(1) of the Companies Act 2016 on the grounds that Barakah did not comply with all the statutory pre-conditions prior to the grant of the restraining order. The court held that the conditions of section 368(2) of the Companies Act 2016 must be complied with even at the initial application stage, notwithstanding how difficult it may be owing to the significant effect of a restraining order, which prevents creditors from pursuing legal remedies.

In the case of *Goldpage Assets Sdn Bhd v Unique Mix Sdn Bhd* [2020] MLJU 723, the High Court put to rest the long-drawn-out debate over whether unsecured creditors can intervene and be heard in judicial management proceedings. The court held in the affirmative and stated that the court can consider the views of unsecured creditors in an application to oppose the making of a judicial management order.

In the recent landmark decision on the first airline debt restructuring scheme in Malaysia due to covid-19 (*AirAsia X Berhad v BOC Aviation Limited & 14 Ors* (Originating Summons No.: WA-24NCC-467-10/2020)), the High Court held that a scheme of arrangement under section 366 of the Malaysian Companies Act 2016 is an 'insolvency-related event' for the purposes of the Convention and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the Protocol). In this case, the principal jurisdiction question for the High Court is the identification of the classes and to ensure that each class is properly constituted so that the meetings for each of the classes can be properly convened. The High Court held that AirAsia X still bears the duty of absolute transparency and ordered it to unreservedly disclose all material information to assist the court in determining the classification and the composition of the creditors and how the creditors' meetings are to be concluded, and to address any allegation of an abuse of process or if the application is not made bona fide. The High Court further held that it must always be mindful of the possibility of class manipulation. It is incumbent on a company to propose a scheme fairly and not to manipulate the constitution of classes to ensure apparent satisfaction of the statutory requirements. Aircraft lessors of AirAsia X also sought to oppose the proposed scheme of arrangement on, among others, the ground that pursuant to Article IX (10) of the Protocol, upon the occurrence of an insolvency-related event, no obligation of the debtor under the agreement may be modified without the consent of the creditor. The High Court of Malaysia agreed with the aircraft lessors' argument.

Constitutional law case

In the recent decision of *Yakin Tenggara Sdn Bhd v Gula Perak Berhad & 3 Ors and other appeals* (*Yakin Tenggara*), the Federal Court, Malaysia's Apex Court, had the opportunity to consider the effect of the appointment of both Tun Md Raus Sharif (CJ) and Tan Sri Zulkefli bin Ahmad Makinudin (PCA) as Additional Judges on the decision(s) delivered by a panel of the Federal Court which was empanelled by the CJ or which the CJ or PCA, or both, sat as a member. The issue before the Federal Court was one of coram failure, namely whether the appointments of the CJ and the PCA (collectively, the 'two Judges') were invalid, therefore rendering the panels that were empanelled by the CJ or the panels on which either the CJ or the PCA, or both, sat to be invalid, as the two Judges were not entitled to sit in these cases. This argument was premised on the basis that the advice given by the outgoing Chief Justice to the Yang di-Pertuan Agong to appoint the two Judges as Additional Judges of the Federal Court was to take effect several months after the outgoing Chief Justice had retired was invalid because such advice may only be given by a sitting Chief Justice to take effect during his or her tenure. It is on this basis that the applicants sought to review the Federal Court decisions. The Federal Court recognised that the answer would hinge on the application and interpretation of the de facto doctrine. In summary, the de facto doctrine provides that the decisions of a judge or judicial arbiter can be deemed valid on grounds of public policy even if his or her appointment is invalid. The applicants argued, among others, that the de facto doctrine does not apply to constitutional appointments. The Federal Court disagreed with the applicants' argument and dismissed the review applications. The Federal Court's decision in *Yakin Tenggara* is noteworthy in two respects. First, it is a reminder to litigants who wish to challenge the validity of a Federal Court judgment that such judgment cannot be attacked collaterally. Second, it clarifies that the de facto doctrine applies to constitutional appointments and validates any acts of a judge done in his or official capacity, even if his or her appointment was subsequently nullified.

Company law – Lifting or piercing of the corporate veil

In the recent case of *Ong Leong Chiou and another v Keller (M) Sdn Bhd v 2 others* [Civil Appeal No: 02(F)-23-03/2019 (W)], the Federal Court confirmed that the position in law in Malaysia is that the court will lift the corporate veil if a company was set up for fraudulent purposes. In this regard, the Federal Court was of the view that the position in Malaysia on lifting of the corporate veil has been correctly set out by the Federal Court in *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors* [2015] 1 MLJ 773, where it was held, among others, that:

- the court would lift the corporate veil of a corporation if such corporation was set up for fraudulent purposes, or where it was established to avoid an existing obligation or even to prevent the abuse of a corporate legal personality; and

- that fraudulent purposes include actual fraud or fraud in equity. Fraud in equity occurs in cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties; the court would disregard the notional separateness of the companies.

The Federal Court further clarified the difference between the two concepts of piercing the corporate veil and lifting the corporate veil. In this regard, where the wrongdoing in question relates to the abuse of the corporate personality as a 'facade', the principle to be applied is that of concealment. This is where the corporate veil will be lifted to allow the court to look behind it to discover the facts which the corporate structure is concealing. Where the wrongdoing relates to the abuse of the corporate personality as a 'sham' the principle to be utilised is that of evasion. In evasion, the court may disregard the corporate veil if there is a legal right against the person in control of it that exists independently of the company's involvement and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. In such circumstances, the corporate veil will be pierced.

Malaysian courts embracing the use of technology

In the face of the covid-19 pandemic, courts, tribunals and dispute resolution bodies around the world have adopted various options to mitigate the adverse consequences of covid-19 to ensure that there is no or minimal disruption to the dispute resolution process for all stakeholders of the legal system. Arbitral institutions, including the AIAC, have promptly responded to facilitate parties, counsel and arbitral tribunals to ensure fair and efficient arbitration in these uncertain times.

To ensure access to justice, the Malaysian courts have kept up with the march of technology. Case managements continue to be by way of electronic review, and trials and hearings have been extensively conducted online during the period of the Movement Control Order, Conditional Movement Control order and the Recovery Movement Control Order imposed by the government of Malaysia. On 23 April 2020, the Court of Appeal, via teleconferencing, held the country's first virtual hearing, which was made available to the public. For the first time in Malaysia, paperless hearings with the aid of technology have also commenced in the Federal Court.

Further, the experience gained in using technology necessitated by the covid-19 pandemic has also affected how disputes are being handled and decided. In *SS Precast Sdn Bhd v Serba Dinamik Group Bhd* [2020] 1 LNS 316, the High Court exercised its discretion to dispose of three applications by way of video conferencing, despite being objected to by the plaintiff. The High Court was of the view, per obiter, that the court has discretion to proceed by way of video conferencing even if the plaintiff had objected to the use of such facilities prior to or during the conduct of the hearing, as access to justice was a fundamental right of the defendants guaranteed under article 5(1) of the Federal Constitution. Recently, the High Court in *Liziz Plantation v Liew Ah Yong* [2020] 10 CLJ 94 dismissed an application to transfer a case from a High Court in one state to a High Court in another state, holding inter alia that the increasing acceptance of remote communication technology has made the issue of having to physically travel to any court very much less important when considering the transfer of a case.

The quick and continuous efforts of the Malaysian judiciary to mitigate the adverse effects of the pandemic by embracing technology is very welcome. It is hoped that the judiciary and courts will continue to use technology beyond the movement restrictions and the pandemic.

In February 2020, the Malaysian judiciary also made history as the first court in Asia to use artificial intelligence for data sentencing. This initiative is currently used for only two offences in the Sabah and Sarawak courts: section 12(2) of the Dangerous Drugs Act 1952 for drug possession; and section 376 of the Penal Code for rape.

Cyber fraud

The Malaysian High Court recently granted a *Mareva* injunction (freezing order) and proprietary injunction against 'Persons Unknown' for the very first time in the case of *Zschimmer & Schwarz Gmbh & Co Kg Chemische Fabriken v Persons Unknown &* Anor [2021] 7 MLJ 178. Through this case, it is now clear that claims can be brought against anonymous defendants, provided they can be described in a way that makes it possible in principle to locate or communicate with them. This will be particularly useful in cases where fraud is involved.

Coronavirus

38 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020

On 23 October 2020, the government of Malaysia gazetted the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 (the Covid-19 Act). The Covid-19 Act is part of the temporary measures introduced by the government to ease the impact of the pandemic by modifying the provisions of certain legislation. The Covid-19 Act will be in force for two years beginning on 23 October 2020, or in accordance with the date or duration in the relevant parts of the Covid-19 Act.

The Covid-19 Act comprises 19 parts, which can be broadly divided into three categories:

- the inability to perform contractual obligations (Part II);
- modifications to Malaysian legislation (Part III to Part XVIII); and
- the inability to perform statutory duties or obligations or to conduct statutory meetings (Part XIX).

Inability to perform contractual obligations (Part II)

Section 7 of the Covid-19 Act provides that the inability of any party or parties to perform any contractual obligations arising from any of the categories of contracts specified in the Schedule to this part of the Covid-19 Act due to the measures prescribed, made or undertaken under the Prevention and Control of Infectious Diseases Act 1988 shall not give rise to the other party or parties to exercise their rights under the contract. The categories of contracts set out in the Schedule are as follows:

- construction or supply of construction material, equipment or workers;
- performance bonds granted pursuant to a construction contract or supply contract;
- professional services contracts;
- lease or tenancy of non-residential immovable property;
- event contracts;
- contracts by a tourism enterprise;
- religious pilgrimage-related contracts;
- hire-purchase agreement under the Hire Purchase Act 1967 or leasing contract entered into by B40 or M40 classes of persons; and
- credit sales contracts under the Consumer Protection Act 1999.

Part II of the Covid-19 Act operates retrospectively from 18 March 2020 until 30 June 2021. However, notwithstanding section 7, any contract terminated, any deposit or performance bond forfeited, any damages received, any legal proceedings, arbitration or mediation commenced, any judgment or award granted, and any execution carried out between 18 March 2020 and the date of publication shall be deemed to have been validly terminated, forfeited, received commenced, granted or carried out.

Modifications to Malaysian legislation (Part III to Part XVIII)

A summary of some of the key measures is as follows:

- Limitation Act 1953: Any limitation period for bringing an action specified in section 6 of the Limitation Act 1953 that expires during the period from 18 March 2020 to 31 August 2020 shall be extended to 31 December 2020;
- Housing Development (Control and Licencing) Act 1966: Under the Covid-19 Act, during the period of 18 March 2020 to 31 August 2020: developers shall not impose any late payment charges if purchasers fail to pay their instalments; the calculation of time for delivery of vacant possession and for liquidated damages for delivery of vacant possession shall be excluded; and the calculation of the defect liability period and the time for the developer to carry out repair works shall also be excluded;
- Insolvency Act 1967: From the date of publication of the Covid-19 Act up to 31 August 2021, a creditor is not allowed to present a bankruptcy petition against a debtor unless the amount of debt owing by the debtor to the petitioning creditor or creditors (if two or more creditors join in the petition) is at least 100,000 ringgit. In this regard, the minimum threshold of debt has been increased from 50,000 ringgit to 100,000 ringgit. From 1 September 2021 onwards, the minimum threshold of indebtedness for the presentation of a bankruptcy petition will permanently be increased to 100,000 ringgit when the Insolvency (Amendment) Act 2020 comes into effect; and
- Distress Act 1951: Section 5 of the Distress Act 1951 gives landlords the right to apply on an ex parte basis for a warrant of distress to distrain to recover arrears of rent. However, the Covid-19 Act prohibits a landlord from taking action under section 5 for the period from 18 March 2020 to 31 August 2020. This provision applies to all types of premises that are subject to a tenancy agreement. The Covid-19 Act does not preclude landlords from commencing a distress action, but the warrant shall exclude the distrain of arrears in rental for the period between 18 March 2020 and 31 August 2020. The modifications to the Distress Act 1951 expired on 31 December 2020.

Increase of minimum threshold of indebtedness in the case of companies winding up

In April 2020, the Malaysian government announced two winding-up protection reliefs. The first was the increase in the period of time for a debtor company to respond to a statutory demand as set out in the Companies Act 2016. In this regard, the timeline was increased from the usual 21-day period to six months. This expired on 31 December 2020.

The second protection was the increase of the minimum debt threshold for the issuance of the statutory demand from 10,000 ringgit to 50,000 ringgit. This was also meant to expire on 31 December 2020. However, the Malaysian government has temporarily set the minimum debt threshold at 50,000 ringgit from 1 January 2021 to 31 March 2021.

Commentary

Although the Covid-19 Act is a step in the right direction, the saving provision, especially in section 7, may nullify the intended purpose of the Covid-19 Act in itself. This is so as the Covid-19 Act came into force approximately seven months after the first nationwide lockdown on 18 March 2020, where arguably the effects of the pandemic were felt the most by those affected. As there are currently no reported decisions surrounding the interpretation, and by extension, the applicability of the Covid-19 Act, it remains to be seen how effective the act will be and whether the intended purpose provided for in the act is too little, too late.

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