Judicial Approaches on the New York Convention – Malaysian Perspective

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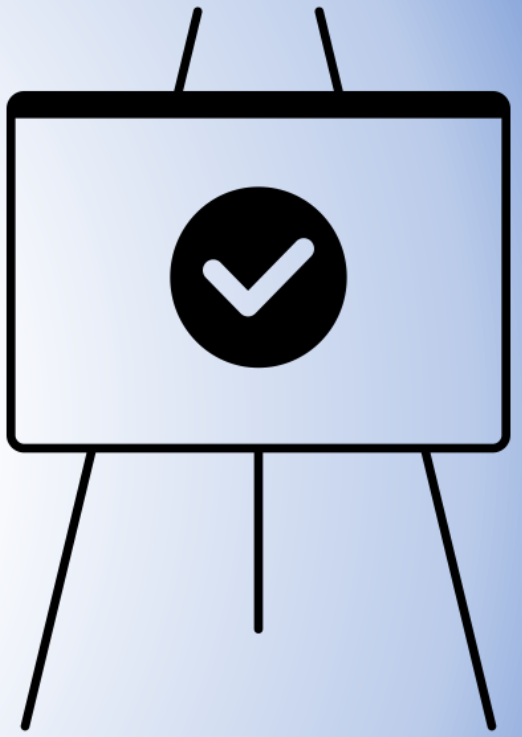
Introduction

- First Arbitration Act in Malaysia, dated 1952;
- The arbitration framework has improved thanks to the support from the solid and independent judiciary;
- Presence of the KLRCA has also helped to develop arbitration in Malaysia;
- Malaysia ratified the New York Convention on 1985.



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Malaysian judiciary approach to enforcement

- Before the NYC, foreign judgments were enforceable in Malaysia only by virtue of the Reciprocal Enforcement of Judgments Act, 1958 (which was repealed and replaced by the Arbitration Act 2005). Malaysian courts have always shown great respect and deference to the judgement of foreign courts (Dato' Ho Seng Chuan v Rabob Bank Asia Ltd [2002] 3 AMR);
- The Arbitration Act 2005 mirrors aspects of the NYC and the provisions of the UNCITRAL Model Law. For instance:
  - Section 7 (waiver);
  - Section 10 (mandatory stay of court proceedings).

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Non-interventionist approach - the Courts

- Section 8 of the AA 2005 limits the courts intervention in arbitration matters (statutory limitation):
  - Sabah Medical Centre Sdn Bhd v Syarikat Neptune Enterprise Sdn Bhd & Anor [2012] 7 MLJ 28: *This judgment is indicative of the fact that courts have restricted themselves to the statutory court intervention in making interim orders*.
  - The Government of India v Cairn Energy India Pty Ltd & Anor [2011] MLJU 717: *It is not the Court's liberty to scrutinize decisions made by arbitrators with respect to questions of law*.

Stay of Court proceedings

- Found under Section 10 of the AA 2005.
- In practice, the interpretation applied:
  - TNB Fuel Services Sdn. Berhad v China National Coal Group Corp [2013] MLJU 483: *It was held that a Court of law should lean towards compelling the parties to honour the arbitration agreement (complying with the kompetenz-kompetenz principle)*;
  - KNM Process Systems Sdn Bhd v Missions Biofuels Sdn Bhd [2012] MLJU 839: *It is mandatory to grant stay where the matter is the subject of an arbitration agreement, unless the arbitration agreement is "null and void, inoperative or incapable of being performed*".

Finality of arbitral awards

- The grounds for setting aside an award are under Section 37. It refers to the same provisions as in the NYC.

  "There is no right of appeal against an arbitral award"

- Section 42 of the AA 2005 refers to the High Court any question of law arising out of an award, if it affects the right of one or more parties.
- Section 43 provides a right of appeal for any decision made by the High Court under Section 42.

Enforcement of Foreign Awards in Malaysia

- Malaysian judiciary has a pro arbitration enforcement stand. The evolution can be traced through the past by looking at previous court decisions.
  - Sri Lanka Cricket v. World Sport Nimbus Pte. Ltd [2006] 3 MLJ 117: *The award was not recognized because the court realized that there was no gazette notification of the NYC under the 1952 Act and this was a compulsory requirement. The parties registered the award as a judgement in Singapore and enforced it in Malaysia under the Reciprocal Enforcement of Judgements Act 1958*.

Court's pro-active enforcement stance in Malaysia

- Many cases support this approach of the Malaysian judiciary:

  - Rmarine Engineering (M) Sdn Bhd v Bank Islam Malaysia Bhd [2012] 10 MLJ 453: *The courts have limited jurisdiction to intervene as the arbitration award is final, binding and conclusive. The court's jurisdiction should be confined to arbitral errors and not appellate errors*;
  - Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401 (FC): *Affirmed the principle of setting aside an award only in exceptional circumstances*.

Court's pro-active enforcement stance in Malaysia

- Twin Advance (M) Sdn Bhd V Polar Electro Europe BV [2013] 7 MLJ 811 395 (CA): *The Court held that the AA 2005, based on Model Law, did not allow any jurisdiction or such a setting aside and that there was no inherent jurisdiction for such an application as well*;

- Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd [2010] 2 MLJ 23: *The Federal Court has refused to entertain "passive remedy" at the enforcement stage relating to a foreign arbitral award where the seat was in the UK. This was, notwithstanding the fact that the Respondent to the said award had not participated in the arbitral proceedings*.

Court's pro-active enforcement stance in Malaysia

- In comparison with the Arbitration Act 1952, it is necessary to highlight the following judgements:
  - Hartela Contractors LTD v Hartecon JV Sdn Bhd [1999] 2 CLJ 788 (CA): *The Court stated that a general rule in common law is that the award is final. There are very limited exceptions that allow a court to intervene and set aside an award*;
  - Bauer (M) Sdn Bhd v Daewoo Corp [1999] 4 CLJ 545: *Issue relating to passive remedy under the old regime. A party agrees to refer disputes that are not covered by their original agreement to the arbitrator. The party that chooses to do so, may be estopped from later asserting that the arbitrator lacked jurisdiction*.

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Judiciary approach towards arbitration agreements

- The Arbitration Act 2005 embraces the same requirements as the NYC for the validity of an arbitration agreement. Further, there is a need to have an arbitration agreement in writing.
  - Ajwa Food Industries Co (MIGOP) Egypt v Pacific Interline Sdn Bhd & Another [2013] 2 CLJ 395: *The High Court dismissed an application to set aside an Award and the Court of Appeal upheld the High Court decision. The Court approved of a more liberal view of the requirement that an arbitration agreement must be in writing.*
- The writing feature is in connection with Section 38 of the Arbitration Act 2005, which does not permit the Claimant to seek recognition of the award if there is no written arbitration agreement with the Respondent to the award.

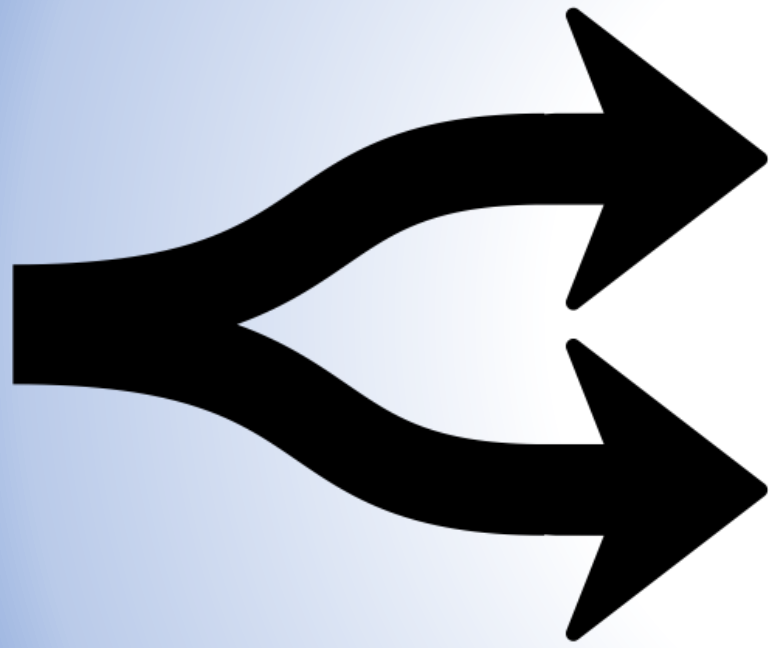
Contemporary issues

The dichotomy in the AA 2005 may be removed to ensure international standards.

There are critics on Section 37 and Section 39 of the AA 2005 that provide options to “set aside” the award under different terms.

These factors impact on the “safe seats”. There needs to be a consistent approach

Conclusion



Malaysian Judiciary has evolved to becoming a very sophisticated, pro-arbitration friendly judiciary, particularly with the NYC and enforcement of judgments.

The future will bring in further challenges to our judiciary, as there are no definitive answers such as on Malaysia's position on passive remedies.

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Thank you

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