

Arbitration in Malaysia

A long, straight wooden pier extends into the sea at sunset. The sun is low on the horizon, creating a bright starburst effect with rays of light. The sky is a mix of blue and purple, and the water is dark. The pier has a wooden railing on the right side.

Arbitration Act 2005

Arbitration (Amendment) Act 2011

Seat v Venue

- Is the Arbitration governed by Malaysian Arbitration Act 2005?
- Seat of Arbitration as distinct from Venue
- Lex Arbitri not Lex Contractus
- Jurisdictional Law of the Arbitration
- Is Seat = Malaysia? Arbitration Agreement
- If silent = Venue is Seat? – Lex Loci

Adopting the Model Law

- UN Model Law on Arbitration
- International Standard & Familiarity
- Compromise between Civil & Common Law Systems
- Not Total but Essential Philosophy Adoption
- Signatory to New York Convention
 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

International v Domestic

- 2 Regimes in 1 Act
- International : No Part III unless opt in
- Domestic : Part III apply unless opt out

- How to distinguish international arbitration from domestic arbitration?

International v Domestic

- Location of Place of Business of Any One Party
 - Not Where Registered/Principle Place of Business
 - Not Foreign Holding Company or Shareholders
- Where Companies have 2 or More Places of Business?
- Closest Relationship to Arbitration Agreement
- Case Law : Singapore & HK : means closest to subject matter of Arbitration (explanatory notes from UN)

Domestic Lex Contractus

- S.30(1) 2005 Act : Domestic & Seat Malaysia

Substantive Law can only be Malaysian Law

- S.30(1) 2011 Act : Domestic & Seat Malaysia

Unless Otherwise Agreed by Parties, the
Substantive Law is Malaysian Law

Court Assistance

- Interim Measures = Injunctions, Preservation Orders, Security of Cost or Amount in Dispute, Receiver, Discovery etc.
- Some concurrent with Arbitrator's powers
- If Foreign Arbitration
 - Aras Jalinan v Tipco Asphalt Public Co Ltd [2008] 5 CLJ 654 : No because of S.8
 - 2011 Amendment: Can – New s.11(3)

Stay Court Proceedings

- Can if No Steps are taken in the Proceedings
 - Can Enter Unconditional Appearance
 - Can Defend Injunctions – File Affidavits
 - Cannot File Defence
- Proviso : Unless Arbitration Agreement Null & Void, Inoperative or Incapable of Performance
- Previous Repealed Proviso: That there is in fact no Dispute
- 2011 Amendment : Also Foreign Arbitration

Court Interference

- No Anti- Arbitration Powers
- Yet :
 - Bocard Oil & Gas Sdn Bhd v TNB Engineering Consultancy Sdn Bhd [2009] 2 CLJ 583 – exclusive jurisdiction clause to Courts of Malaysia
(ignored : Paul Smith Ltd v H&S International Holding Inc [1991] 2 Lloyd’s Rep 127 – exclusivity is for the lex arbitri matters)

Court Interference

- Yet:
 - Lembaga Pelabuhan Kelang v Kuala Deminsi Sdn Bhd [2010] 9 CLJ 532 – words “may” & court jurisdiction clause
 - Assar Senari Holdings Sdn Bhd v Teratai Sanjung Holdings (M) Sdn Bhd : 22.12.2011 – no power to determine whether substantive agreement is null and void [ignore the previous law & S.18(2)]

Competence

- Principle of Kompetenz-Kompetenze
- S.18 – deal with all jurisdictional issues
- S.18 – deal with whether substantive contract is null and void : separability of arbitration clause
- S15 – deal with challenge on impartiality or independence
- Can appeal to HC only

Foreign Awards Recognition

- For Enforcement in High Court
- Award made in Foreign Country
- Foreign = Signatory to NY Convention
- Sri Lanka Cricket v World Sport Nimbus Pte Ltd [2006] 2 CLJ 316 – Country must be gazetted in Malaysia, S.2(2) CREFA
- Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd [2010] 1 CLJ 137 FC – overturned Sri Lanka Cricket

Same Old Cliché

Justice Delayed is Justice Denied

v

Justice Hurried is Justice Buried

Focus on Improvement

Where is the emphasis?

Qualitative

v

Quantitative

"It takes two to Tango"

- Quality Determiner/Facilitator
- Efficient, Speedy, Inexpensive, Real Time ADR

Arbitration

- Is it just too long and expensive?
- Do lawyers get in the way?
- Courts – granting stay with conditions
- There are Tools of Procedure but not used:-
 - Statement of Case + Relevant Documents
 - IBA Rules of Disclosure & Discovery
 - Chess Clock Arbitration – Limited Time
 - Bifurcation of Issues/Hot-Tubbing Experts

Arbitration

- Legislature: Pointed the Way
 - Section 20 Malaysian Arbitration Act 2006
 - Reasonable Opportunity of Presenting the Case
 - Article 18 Model Law
 - Full Opportunity of Presenting the Case
- Parties won't agree & domestic arbitrators won't force – what then?
- Imposed in the Arbitration Agreement

Can It Work?

- Yes : Arbitrator Empowered under the Rules
- Limited Time – Chess Clock Hearing Method
- Rebuttal Witness Statements/Pre-Hearing Interrogatories
- Hot Tubbing
- Private Assessment of Cross-Examination Areas & Directions
- Strict Time Frames : not followed/ no weight

Can It Work?

- Only Arbitrations where Dispute Sum below RM1 million?
- Follow up to Adjudication Process
 - All Evidence In & Presented Before
 - No Ambush by Claimant
- On Project Determinations
 - Evidence is fresh & accessible
 - Parties are in dispute: no ambush

THE END...
(or is it just the beginning)