

# Court cases contribute to development of arbitration law

## Gan Partnership | Litigation - Malaysia



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- › East or west Malaysian high court
- › Arbitration in preference to court proceedings
- › Timeliness and delivery of arbitral award

Due to the various amendments to the Arbitration Act 2005 (the 2005 Act) throughout the years, the Malaysian courts have been occupied with interpreting the provisions in the arbitration act and developing the laws of arbitration. The following court cases illustrate this progression.

### East or west Malaysian high court

#### Background

Malaysia is made up of Peninsular Malaysia (West Malaysia) and Sabah and Sarawak (East Malaysia). While the 2005 Act and its amendments apply throughout Malaysia, this does not mean that the term "High Court" in the 2005 Act refers to both the high courts in West Malaysia and East Malaysia.

#### Decision

In settling the issue of which high court (ie, Kota Kinabalu High Court in East Malaysia or Kuala Lumpur High Court in West Malaysia) has supervisory jurisdiction to hear an application to set aside an arbitration award, the Federal Court<sup>(1)</sup> looked at where the seat of arbitration was determined by party autonomy and decided that:

*it is the court at the seat of the domestic arbitration that enjoys exclusive jurisdiction to exercise supervisory and regulatory powers over the arbitration, it follows that the court where the cause of action arose cannot oust the jurisdiction afforded and vested in the seat court.*

#### Comment

This decision provided clarity as to the jurisdictions of the high courts in Malaysia, insofar as hearing matters concerning arbitration is concerned, in light of confusion caused by its unique geographical landscape.

### Arbitration in preference to court proceedings

#### Background

It is often debated whether a case ought to be stayed in court and referred to arbitration based on the arbitration agreement between parties pursuant to section 10(1) of the 2005 Act (provided that the party who makes the application under this provision has not taken any other steps in the court proceedings). The court would generally grant the application for stay if the arbitration agreement is valid, operative and capable of being performed.

However, should the parties misstep, the court may decide otherwise.

#### Facts

In *Kebabangan Petroleum Operating Company Sdn Bhd v Mikuni (M) Sdn Bhd & Ors*,<sup>(2)</sup> the appellant initiated an action in arbitration against the first respondent company. However, as the first respondent repeatedly failed to pay its portion of the provisional advance deposit, the appellant filed an action in court against all five respondents (ie, the company and its directors).

In addition to filing an application to stay the court action pending the matter to be referred to arbitration, the respondents (save for the fourth respondent) filed an application to either strike out the appellant's writ against the respondents or stay the court proceedings (the striking out application).

#### Decision

While the high court allowed the respondents' application for a stay, the Court of Appeal disagreed with the decision.

The Court of Appeal considered that, as the nature of the striking out application required the court to determine the merits of the appellant's claim to adjudicate its veracity, the respondents had, by their conduct, taken steps in the court proceedings pursuant to section 10(1) of the 2005 Act. In other words, the respondents' conduct affirmed their unequivocal intention and willingness to submit and participate in the court's proceedings in preference to arbitration.

Interestingly, the Court of Appeal also found that, as the first respondent had failed to pay its portion of the deposit for over a year, the arbitration agreement between the parties was rendered inoperative.

#### Comment

In view of this Court of Appeal decision, it is advisable for parties to conduct themselves in accordance with the intention for disputes to be resolved in arbitration and tread carefully in any applications made in court.

### Timeliness and delivery of arbitral award

#### Decision

In a significant Malaysian arbitration development, the Court of Appeal decided that an arbitral award that was delivered outside the allowable timeframe would be set aside as the arbitrator had exceeded their jurisdiction.<sup>(3)</sup>

In arriving at this decision, the Court of Appeal considered as follows:

- The arbitration rules (article 21.3) that govern the arbitral proceedings specifically provide for a timeframe for arbitral award delivery as well as a mechanism for an extension of time, if required by the arbitrator.
- The timeline in article 21.3 is mandatory for the arbitrator (as opposed to being a mere procedural requirement), from which the arbitrator derived their jurisdiction. Therefore, an argument of waiver by the parties in relation to the cessation of the arbitrator's mandate and jurisdiction does not apply.
- No application was made under section 46 of the 2005 Act, which gives the court power to extend time.

**Comment**

This decision undoubtedly places a heavier burden on arbitrators who preside over time-sensitive arbitral proceedings. However, on an objective note, this decision is welcomed by parties to arbitration, as they will appreciate the fact that a decision will be delivered within a reasonable timeframe, subject only to the arbitrator applying for a time extension.

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**Endnotes**

(1) *Masenang Sdn Bhd v Sabanilam Enterprise Sdn Bhd* [2021] 9 CLJ 1.

(2) [2021] 7 CLJ 544.

(3) *Ken Grouting Sdn Bhd v RKT Nusantara Sdn Bhd & Another Appeal* [2021] 2 CLJ 173.