

**THE INTRODUCTION OF THE ASIAN INTERNATIONAL
ARBITRATION CENTRE COURT OF ARBITRATION:**

THE UNRESOLVED ISSUES OF IMMUNITIES

by

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ABSTRACT

The Parliament of Malaysia has passed the Arbitration (Amendment) Bill 2024 and the Construction Industry Payment and Adjudication (Amendment) Bill 2024 ('Amendment Bills'). The amendments are primarily to reflect the reformation of the Asian International Arbitration Centre ('AIAC') pursuant to the Supplemental Agreement between the Government of Malaysia and the Asian-African Legal Consultative Organization (AALCO) relating to the AIAC in Kuala Lumpur executed on 20 February 2024 ('Supplemental Agreement'). The reformation refers mainly to the introduction of the AIAC Court of Arbitration and the substitution of the position of the Director of the AIAC with the President of the AIAC Court of Arbitration. The most significant result of the reformation is that the President of the Court of Arbitration, instead of the Director of the AIAC, would have the power to appoint arbitrators and adjudicators. Following the passing of the Amendment Bills, the question that immediately followed was: What is the difference between a Director of the AIAC and a President of the Court of Arbitration? It appears from the amendments that there is no difference between their roles and functions. As it appears to be just a substitution, an interesting question arises regarding the status of the President of the Court of Arbitration *vis-à-vis* the immunities enjoyed by the Director of the AIAC.

INTRODUCTION

The Parliament of Malaysia has passed the Arbitration (Amendment) Bill 2024 and the Construction Industry Payment and Adjudication (Amendment) Bill 2024 (hereinafter collectively referred to as ‘Amendment Bills’). The amendments are primarily to reflect the reformation of the Asian International Arbitration Centre (‘AIAC’) pursuant to the Supplemental Agreement between the Government of Malaysia and the Asian-African Legal Consultative Organization (AALCO) relating to the AIAC in Kuala Lumpur executed on 20 February 2024 (‘Supplemental Agreement’).^[1]

The reformation refers mainly to the introduction of the AIAC Court of Arbitration and the substitution of the position of the Director of the AIAC with the President of the AIAC Court of Arbitration. The most significant result of the reformation is that the President of the Court of Arbitration, instead of the Director of the AIAC, would have the power to appoint arbitrators and adjudicators. Such power, according to the Supplemental Agreement, should be exercised in consultation with the members of the Court of Arbitration.^[2] It is however not clear for now as to the enabling act for the setting up of the Court of Arbitration, composition, number and qualifications of the members of the Court of Arbitration. The Protem Committee for the AIAC Court of Arbitration established on 1 June 2024 is believed to be working on the details of the Court of Arbitration.^[3]

Following the passing of the Amendment Bills, the question that immediately followed was: What is the difference between a Director of the AIAC and a President of the Court of Arbitration? It appears from the amendments that there is no difference between their roles and functions, except that based on the Supplemental Agreement, the President of the Court of Arbitration is expected to consult the members of the Court of Arbitration for the appointment of arbitrators, mediators and adjudicators.^[4] As it appears to be just a substitution, one would expect that a President of the Court of Arbitration enjoys the same immunities as a Director of the AIAC. Nevertheless, this does not seem to be the case for

now, notwithstanding that the difference might not be intended.

This article examines the difference between the immunities enjoyed by a Director of the AIAC prior to the Amendment Bills and that of a President of the Court of Arbitration after the Amendment Bills. Flowing from there, it suggests the action that should follow to bridge the difference while studying the need to do so. Then, this article concludes by summarising the positions put forward. This article makes reference to the relevant legislation, international instruments and case law.

A PRESIDENT OF THE COURT OF ARBITRATION ARGUABLY HAS A NARROWER SCOPE OF IMMUNITIES THAN A DIRECTOR OF THE AIAC

Section 11 of the Arbitration (Amendment) Act 2024 has the effect of amending the immunity which originally conferred upon “the Director of the AIAC and any other person” designated or requested by the parties to appoint or nominate an arbitrator, to “any person” designated or requested by the parties to appoint or nominate an arbitrator.^[5] This appears to be a consequential amendment following the removal of the position of the Director. The words “any person” in the context of section 48 of the Arbitration Act 2005 (‘Arbitration Act’), though not defined, would necessarily include the President of the Court of Arbitration. It is rather peculiar as to why, instead of substituting the word “Director” for the words “President of the Court of Arbitration”, like every other corresponding change made to the Arbitration Act, the amendment sought to remove the reference to the Director. The intention may be to extend such immunity to the Vice President, the members of the Court of Arbitration or any other persons who might take on the role of the President in the absence of the latter. The details of the office of the Vice President and the members of the Court of Arbitration are anticipated to be introduced through subsequent amendments to the rules of the AIAC.

One must not lose sight of the basis of the immunity. Historically, the Director and the officers of the Kuala Lumpur Regional Centre of Arbitration (‘KLRCA’) (now known as the AIAC)^[6] were conferred

immunities as a result of the Host Country Agreement between the Government of Malaysia and AALCO ('Host Country Agreement'). The immunities are provided for in Article III of the Host Country Agreement 2013. To be specific, the Host Country Agreement 2013 provided immunities for the KLRCA (now AIAC) for the purpose of executing its functions; immunities for the foreign professional staff of the AIAC in respect of words spoken or written and all acts performed by them in their official capacity; and the Director of the KLRCA (now AIAC), if he is a citizen of Malaysia. As to the scope of the immunities, Article III, Clause 6 of the Host Country Agreement 2013 stipulates that the Minister charged with the responsibility for foreign affairs should decide pursuant to the International Organizations (Privileges and Immunities) Act 1992 ('IOPIA'). Section 4(1) of the IOPIA allows the Minister to make regulations to confer, *inter alia*, upon the high officer^[7] or any person^[8] holding an office other than the high officer in an international organisation, all or any immunities. Through the Kuala Lumpur Regional Centre For Arbitration (Privileges and Immunities) Regulations 1996 ('Regulations'), the Minister made regulations to, among other things, declare the KLRCA (now AIAC) as an international organisation and confer immunities to a high officer – which is defined as the person holding the post of the Director^[9] of the KLRCA (now AIAC) and professional staff who are not citizens of Malaysia.^[10]

Despite the passing of the Amendment Bills, no equivalent regulation has been made or forthcoming from the Minister. Without such a regulation, the President of the Court of Arbitration is not a high officer under IOPIA and would not enjoy the same immunities as previously enjoyed by the Director of the AIAC. Then, does this mean that the President only enjoys immunity under the post-amendment section 48 or could the Regulations be read to the effect that the modification in the Amendment Acts equates the role of a Director to that of a President and hence equates the President to a high officer? The distinction makes a difference.

Section 48 appears to restrict the scope of the immunity to “anything done or omitted in the discharge of the function” of appointing or nominating

an arbitrator only. In other words, the President does not enjoy immunity under section 48 if and when he or she performs other functions as may be entrusted upon him or her in the future. It is evident from, for example, the AIAC Arbitration Rules 2023 that the Director of the AIAC is entrusted with other functions aside from the appointment and nomination of arbitrators. Under the AIAC Arbitration Rules 2023, the Director of the AIAC has power, for example, to decide on a challenge of an arbitrator,^[11] suspension of proceedings pending the challenge of an arbitrator,^[12] consolidation of proceedings,^[13] determination of the amount of dispute when a claim or counterclaim is not quantified for the purpose of deposit calculation,^[14] etc. Therefore, it is not a baseless speculation that a President of the Court of Arbitration may similarly be entrusted with these functions when the AIAC Rules are amended to take these changes into consideration. Reading the post-amendment section 48 in isolation of the IOPIA and the Regulations, the President of the Court of Arbitration will not be immune from legal proceedings challenging his conduct or decisions in the performance of those functions. Furthermore, the immunity under section 48 is subject to a caveat – the immunity will be waived if the act or omission in question is shown to have been made in bad faith. In other words, section 48 only confers restricted immunity.

As a contrast to section 48, IOPIA, read together with the Regulations, confers a wider scope of immunities to the Director of the AIAC. If the Director is a citizen of Malaysia, he or she enjoys immunities in respect of acts and things done in such capacity;^[15] and if he is not a citizen of Malaysia, the like immunities are accorded to a diplomatic agent.^[16] The wider scope of immunities will be able to be extended to the functions that might be performed by the President of the Court of Arbitration other than the nomination and appointment of arbitrators only. However, in the absence of a similar or equivalent regulation from the Minister, it may be argued that the President of the Court of Arbitration would only enjoy limited immunity under the post-amendment section 48.

On the other hand, as compared to section 48 of the Arbitration Act, the immunity in the context of the Construction Industry Payment and

Adjudication Act 2012 ('CIPAA') is worded in section 34 of CIPAA in a broader term. It is extended to any officer of the AIAC for any act or omission done in good faith in the performance of his functions under the CIPAA. Hence, the absence of a Minister's regulation under section 4(1) of the IOPIA does not adversely affect the protection conferred to the President of the Court of Arbitration in the discharge of his functions in good faith under the CIPAA. In this regard, the recent Federal Court judgment in *Asian International Arbitration Centre v. One Amerin Residence Sdn Bhd & Ors and Another Appeal* [2025] 3 CLJ 633 is noteworthy. In that case, the Federal Court upheld the immunity of the AIAC in discharging its functions under the CIPAA on the ground that such immunity is consistent with the fundamental object and purpose behind the establishment of the AIAC^[17] and the Host Country Agreement.^[18] Although the case concerns the extent of immunity enjoyed by the AIAC – as opposed to the immunity enjoyed by its officer or the Director as discussed in this article – the judgment is significant in the context of this article for a few reasons. First, it shows the judiciary's inclination to interpret the relevant domestic legislation in line with the country's obligations under international law on immunities and privileges.^[19] Second, the approach taken in that case suggests and makes a precedent that the courts should give a purposive interpretation to the legislation on immunities and privileges.^[20] Third, the pronouncement that there is no necessity to draw a distinction on the capacity of the AIAC either as an international arbitral institution or the statutory adjudication authority before the AIAC is entitled to enjoy the immunity conferred under the IOPIA and the CIPAA^[21] suggests that the AIAC should enjoy the same immunity in both capacities. Arguably, the Federal Court's rationale in that case can be used to extend the immunity to the President of the Court of Arbitration, and consequentially rendering the lack of the said Minister's regulation under section 4(1) of the IOPIA insignificant. However, as long as that position has not been tested and settled by the courts, a regulation similar to the Regulations is still necessary to confer the immunities under IOPIA on the anticipated President of the Court of Arbitration upon the coming into effect of the Amendment Acts.

THE GOVERNMENT OF MALAYSIA HAS THE OBLIGATION TO ENSURE IMMUNITIES

The Host Country Agreement 2013 provides for immunities for the Director of the AIAC who is now going to be substituted with the President of the Court of Arbitration. According to the Host Country Agreement 2013, the immunities shall be determined by the Minister charged with foreign affairs pursuant to the IOPIA. Therefore, the Government of Malaysia has a legal obligation to ensure that the President of the Court of Arbitration would enjoy immunities under the IOPIA.

This may be the right juncture to remind ourselves of the painful history of the International Court of Justice's ('ICJ') findings and pronouncements in the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*,^[22] also known as the Cumaraswamy Advisory Opinion. There, the ICJ gave an advisory opinion on "the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General, and on the legal obligations of Malaysia in this case". Dato' Param Cumaraswamy was the Commission's Special Rapporteur on the Independence of Judges and Lawyers appointed by the Commission on Human Rights. At the same time, he was also a Malaysian jurist. He gave an interview to a foreign magazine whereby he commented on certain litigations that had been carried out in Malaysian courts. The interview was published in an article circulated to Malaysia, and two commercial companies in Malaysia sued him for defamation. The cases went on from the High Court to the Court of Appeal and the Federal Court. The question before the Malaysian courts was whether he enjoyed immunities.^[23] The Malaysian courts' rulings do not favour immunities. The ICJ found that "Malaysia did not act in accordance with its obligations under international law"^[24] because section 22(b) of the Convention requires experts on mission to be accorded immunity from legal process of every kind in

respect of words spoken or written and acts done by them in the course of the performance of their mission.^[25]

The Government of Malaysia accepted the ICJ's advisory opinion. Subsequently, the High Court, in one of the actions instituted by one of the Malaysian companies, struck out the action.^[26] Interestingly, the then High Court Judge RK Nathan, in delivering the judgment, lamented that:

‘Whist this court might disagree with certain aspects of the decision of the ICJ, the decisive acceptance of the ICJ’s ruling by the parties will in my view prevail in respect of this case because the parties had specifically agreed to refer this case for an advisory opinion from the ICJ. It is my judgment that this case should not be treated as a set precedent for all future cases’.^[27]

It is not the position of this article that the Cumaraswamy Advisory Opinion has a bearing on the current situation due to the lack of a regulation under section 4(1) of the IOPIA. However, it shows the far-reaching consequences on the international plane when a State fails to confer immunities to a person in accordance with its international obligation. In view of the possible confusion that may arise from the absence of a regulation from the Minister pursuant to section 4(1) of the IOPIA, a new regulation similar to the Regulations expected from the executive arm of the Government after the Amendment Acts come into force.

CONCLUSION

The Amendment Acts are evidence of the genuineness of Malaysia as a State party to the Host Country Agreement to fulfil its legal obligations thereunder. It is a proactive step to achieve a more comprehensive administrative system in the AIAC with a better check-and-balance mechanism in place. However, as of the present, the Amendment Acts have left some ambiguities or room for arguments about the immunities of the anticipated President of the Court of Arbitration, particularly for his or her conduct in discharging the functions apart from nominating and appointing

arbitrators. These functions, based on the AIAC Arbitration Rules 2023, are related to the promotion or facilitation of arbitration. Prior to the Arbitration (Amendment) Act 2024, the Director of the AIAC was in charge of these functions and enjoyed the wider immunities under IOPIA. However, after the Arbitration (Amendment) Act 2024, the anticipated President of the Court of Arbitration would enjoy the more restricted immunity under the amended section 48 of the Arbitration Act in the absence of a Minister's regulation pursuant to section 4(1) of the IOPIA. This should not happen if the intention of the Arbitration (Amendment) Act 2024 is to substitute the position of the Director with the President of the Court of Arbitration only. The President of the Court of Arbitration ought to enjoy the same immunities as previously conferred upon the Director of the AIAC.

As such, the Government of Malaysia or the Minister who is in charge of foreign affairs should act promptly by making a regulation similar to the Regulations to confer the immunities under IOPIA on the anticipated President of the Court of Arbitration upon the coming into effect of the Amendment Act. Aside from avoiding confusion, it is also to fulfil our international obligation under the Host Country Agreement. Failing to do so would leave room for the growth of unresolved issues on immunities of the anticipated President of the Court of Arbitration. It would be too late to remedy the discrepancies between the amended section 48 of the Arbitration Act and section 4(1) of the IOPIA if they were only brought up in courts later.

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Endnotes:

[¹] Arbitration (Amendment) Bill 2024, Explanatory Statement, p 11, para 3.

[²] The Supplemental Agreement, p 2, Clause E(e).

[3] ‘Establishment of the Proteam Committee for the AIAC Court of Arbitration’, *AIAC* (Web Page, 1 June 2024) <<https://www.aiac.world/news/393/Establishment-of-the-Proteam-Committee-for-the-AIAC-Court-of-Arbitration>>.

[4] The Supplemental Agreement, p 2, Clause E(e).

[5] Arbitration (Amendment) Act 2024, p 12.

[6] See Arbitration (Amendment) Act 2018, s 2. The Arbitration Act 2005 was amended by substituting the words “KLRCA” with the words “AIAC” wherever appearing.

[7] IOPIA, s 4(1)(b)(i).

[8] *Ibid*, s 4(1)(d)(i).

[9] KLRCA (Privileges and Immunities) Regulations 1996, regs 1A and 3A.

[10] *Ibid*, reg 4.

[11] AIAC Arbitration Rules 2023, r 4(5).

[12] *Ibid*, r 4(4).

[13] *Ibid*, r 10(1).

[14] *Ibid*, rr 18(2) and 19(5).

[15] KLRCA (Privileges and Immunities) Regulations 1996, reg 3A(2).

[16] *Ibid*, reg 3A(1); IOPIA, Second Schedule, Part I.

[17] *Asian International Arbitration Centre v. One Amerin Residence Sdn Bhd & Ors and Another Appeal* [2025] 3 CLJ 633 [92] at p 664.

[18] *Ibid* [90]–[98] at pp 664–667.

[19] *Ibid* [128] at p 673.

[20] *Ibid* [114]–[116] at pp 670–671.

[21] *Ibid* [100] at p 667.

[22] Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports 1999 at p 62.

[23] See *MBF Capital Bhd & Anor v. Dato' Param Cumaraswamy* [1997] 3 CLJ 927; *Dato' Param Cumaraswamy v. MBf Capital Bhd & Anor* [1998] 1 CLJ 1.

[24] Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion ICJ Reports 1999 at p 88.

[25] *Ibid.*

[26] *Insas Bhd & Anor v. Dato' Param Cumaraswamy* [2000] 4 CLJ 709 at p 717.

[27] *Ibid.*