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International Commercial Arbitration in Malaysia

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ABSTRACT

In the recent two decades, the wave of globalisation has hit the Malaysian market. It hence contributes to the popularity of arbitration as the means to settle cross border commercial disputes. The existing literature concerned with Malaysia suggests that the recent trend in Malaysia is that arbitration has become the dominant choice of dispute resolution forum. Using qualitative and doctrinal methods, this paper seeks to analyse the regulatory framework for international commercial arbitration in Malaysia, before and after Malaysia's accession to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958* (hereinafter, NYC 1958). The NYC 1958 is one of the most successful international treaties with 161 contracting States. The NYC 1958 aims to promote uniform practical procedures for the recognition and enforcement of foreign arbitral awards in its contracting States, irrespective seat of the awards. In doing so, the paper examines two significant periods of arbitration laws in Malaysia: pre and post-accession to the NYC 1958. The paper concludes that Malaysia no longer follows English arbitration legislation and instead follows international best practice by adopting the *UNCITRAL Model Law on International Commercial Arbitration* (hereinafter, UML) as the basis of its modern legislation, the *Arbitration Act 2005*. Malaysian courts are also seen to adopt a positive 'pro-enforcement' attitude in the application to recognise and enforce foreign arbitral awards, in promoting maximum enforcement of awards as promoted by the NYC 1958 and the UML.

Keywords: *Arbitration Act 2005*, international commercial arbitration, New York Convention 1958, recognition and enforcement of foreign arbitral awards

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INTRODUCTION

International Commercial Arbitration (hereinafter, ICA) provides a neutral forum for dispute resolution that is detached from the parties' national systems and courts (Born, 2012). The key benefit of ICA is that it is more readily and expeditiously enforced by both international arbitration convention and arbitration legislation (Born, 2012). The lifeblood of international commercial contracts is provided by the assurance embodied in the enforcement status of arbitration agreements and awards through international treaties (Fiske, 2004). Many businesses would not contract abroad for fear of foreign litigation without a neutral, efficient and fair dispute resolution that is legally enforceable, such as arbitration (Fiske, 2004).

The *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958* (hereinafter, NYC 1958) is one of the most successful treaties in the international law (Wolff, 2019). The purpose of NYC 1958 was to promote and encourage cross-border transactions and commerce (McLean, 2009), now boosted by 161 signatories from all over the world (UNCITRAL, 2020). A pro-enforcement regime is provided by NYC 1958 with its expedited recognition procedures and limited grounds for refusing the recognition and enforcement of awards (Born, 2012). With NYC 1958's numerous signatories, especially the major trading States, the enforcement of foreign arbitral awards now has more considerable acceptance worldwide than foreign judgments (Blackaby et al., 2009).

The paper seeks to analyse the provisions and legal framework for the recognition and enforcement of foreign arbitral awards in Malaysia. In doing so, this paper examines the regulatory framework of ICA in Malaysia before and after its accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter, NYC 1958). It finds that the first period, from the first arbitration legislation in Malaysia, the Arbitration Ordinance XIII of 1809 until the *Arbitration Act 1952* (hereinafter, AA 1952), involves full court supervision over arbitration. Legislation from this period was *in pari materia* with English legislation Malaysian courts followed English courts' approach in maintaining full supervision over arbitration, both domestic and international. Unlike international arbitration, domestic arbitration must be held and subject to the domestic law of that place (Blackaby et al., 2009). Therefore, the courts perform supervisory role over domestic arbitration. On the other hand, international arbitration transcends beyond national boundaries where the enforcement court are bound to respect its obligation to adhere to the NYC 1958, subject to the reservations entered by the State when ratifying or acceding to the NYC 1958.

The second period, which started after Malaysia's accession to NYC 1958 in 1985, demonstrates Malaysia's efforts to conform to international best practice, albeit only on the recognition and enforcement of foreign awards. This period portrays Malaysia's efforts to move away from

transplanting English domestic legislation and instead adopts UNCITRAL Model Law on International Commercial Arbitration 1985 (hereinafter, UML) as the basis for AA 2005. Historically, the English courts were known for extensive judicial intervention in arbitral proceedings (Tweeddale & Tweeddale, 2005). Unlike Malaysia, the English government decided not to adopt UML as the basis of its new legislation, the *Arbitration Act 1996* (hereinafter, AA 1996). The AA 1996 repealed most of the previous arbitration legislation in England and currently is the most comprehensive arbitration statute in England. However, the AA 1996 moved English law closer to UML, and international best practice (Merkin & Flannery, 2014). The paper concludes that Malaysia opted to follow international best practice by adopting UML as the basis of its *Arbitration Act 2005* (hereinafter, AA 2005). Malaysian courts also adopt positive 'pro-enforcement' attitude in the application to recognise and enforce foreign arbitral awards.

METHODS

The methods of the study would be primarily qualitative research and analysis. The methodological approach followed was doctrinal research. Doctrinal research enquires what the law is on a particular subject matter (Dobinson & Johns, 2007). The author, in conducting doctrinal research, collects and subsequently analyses relevant legislation and law cases to investigate the law in that particular area (Dobinson & Johns, 2007). This paper investigated the regulatory framework of ICA in Malaysia. This paper critically examined the essential features of statutes and law cases to establish a complete set of statements of law on ICA in Malaysia (Hutchinson, 2013). The paper conducted a critical examination and analysis of the legislation and law cases in Malaysia to determine the law applicable in Malaysia both pre and post-accession to NYC 1958.

RESULTS AND DISCUSSIONS

Legal Framework of International Commercial Arbitration in Malaysia

The regulatory framework of ICA in Malaysia involves two significant periods: Pre-accession to NYC 1958 and post-accession to NYC 1958.

Pre-Accession to NYC 1958

Arbitration Ordinance XIII of 1809-Arbitration Act 1952. The first period of regulatory framework of arbitration in Malaysia involves a period when the courts were given broad powers to supervise arbitration proceedings. It was influenced by British colonisation and Malaysian courts followed the English courts' hostile attitude towards arbitration. Malaysia had domestic arbitration laws copied exactly from English legislation. The first statutory law on arbitration in Malaysia was Arbitration Ordinance XIII of 1809, which applied to the Straits Settlements, consisting of Malacca, Penang and Singapore (Davidson & Rajoo, 2006a). The *Arbitration Ordinance 1890* replaced *Arbitration Ordinance XIII* in two States in Malaya, Penang and Malacca

(Idid & Oseni, 2014a). In 1950, all States of the Federation of Malaya enacted the *Arbitration Ordinance 1950,* which was modelled on the English *Arbitration Act 1889* (Idid & Oseni, 2014a). An essential feature of *Arbitration Ordinance 1950* is that the Ordinance recognised parties' intention to opt-out of the jurisdiction of Malaysian courts, provided the parties expressed their intention in an arbitration agreement (Idid & Oseni, 2014a).

In 1952, Malaysia (then the Federation of Malaya) enacted the *Arbitration Act 1952* (hereinafter, AA 1952). The AA 1952, which followed England's *Arbitration Act 1950* (hereinafter, English AA 1950) *in verbatim*, did not stipulate any distinction between domestic and international arbitration (Davidson & Rajoo, 2006a). The AA 1952 reflected a time when the Malaysian courts had broad supervisory powers to intervene in the arbitration process (Davidson & Rajoo, 2006a). They were granted excessive powers to intervene, by AA 1952, in almost all aspects of the arbitral process '…ranging from rendering an irrevocable arbitration to revocable, discretionary powers on whether to stay proceedings or not in favour of arbitration, to the appointment of arbitrators and removal of arbitrators' (Idid & Oseni, 2014a, p. viii). The judicial intervention practices of the Malaysian High Courts were excessive, unnecessary and incapacitated the whole arbitral process, which was supposed to be neutral of any State's influence or involvement (Idid & Oseni, 2014a).

Reciprocal Enforcement of Judgment Act 1958. Alternatively, the parties may opt to enforce a foreign arbitral award as a foreign judgment under the *Reciprocal Enforcement of Judgments Act 1958* (hereinafter, REJA 1958). To date, this Act is still applicable. Section 2 of the REJA 1958 specifies that judgment includes arbitral awards unless an award is made by a tribunal in a country outside Commonwealth jurisdiction. According to Section 3 of the REJA 1958, the parties may enforce an award under this Act, provided that they can satisfy three requirements: (1) the award is final and conclusive, (2) payable under a sum of money and (3) rendered by a tribunal of a country specified in the First Schedule.

The provisions are incorporated in Order 69 Rule 9 of the latest *Rules of Court 2012*, where it states that: 'Where an award has, under the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a Court in that place, an applicant may enforce the award in the manner provided for under rule 8. With the coming of the latest AA 2005, the provision under REJA 1958 cannot be overlooked and serves as an alternative to the enforcement regime under AA 2005.

However, the enforcement regime under AA 2005 is still preferable than the enforcement under REJA 1958 as the countries specified in the First Schedule of that Act are signatories of NYC 1958 (Choy & Rajoo, 2017). Also, in comparison, the NYC 1958 stipulates more straight-forward procedures of positive evidence where a party wishing to recognise or enforce a

foreign arbitral award must only supply arbitration agreement and arbitration awards (NYC 1958, Article IV). On the other hand, the party wishing to recognise or enforce a foreign award under REJA 1958 has to satisfy two (2) additional conditions compared to AA 2005 which are an award is final and payable under a sum of money.

Arbitration (Amendment) Act 1980. In 1980, several years before Malaysia decided to ratify NYC 1958, there were steps to adopt the best practices of arbitration conducted under the newly established KLRCA (Abdul Hak et al., 2016). 1n 1980, Malaysia amended its AA 1952 to allow total freedom for arbitration held under the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965* (hereinafter, ICSID), or under the UNCITRAL Arbitration Rules 1976 and the Rules of the KLRCA.

The amendment to Section 34 was not comprehensive as it only covers arbitration held under KLRCA and does not differentiate between domestic and international arbitration. Unlike international arbitration, domestic arbitration is not subject to the NYC 1958. Any arbitration proceedings, including the enforcement of foreign awards in Malaysia, were subject to the full supervisory jurisdiction provided under AA 1952, unless arbitration proceedings were held under ICSID, UNCITRAL Rules or KLRCA Rules. In the case of Klockner Industries-Anlagen GMBH v Kien Tat Sdn Bhd & Anor [1990] 3 MLJ 183, Zakaria Yatim J in 1989 held that the words in Section 34 of AA 1952 were plain, clear and precise, and that the section excluded the court from exercising its supervisory function under AA 1952 or any other written law for arbitration proceedings held under KLRCA.

Also, in the case of Jati Erat Sdn Bhd v City Land Sdn Bhd [2002] 1 CLJ 346, the court held that the 1980 amendment applied to all arbitration held under KLRCA Rules, irrespective of whether the arbitration involved only domestic parties or includes international ones. The amendment barred Malaysian courts from interfering in the arbitration process and causing delays and extra costs to the parties. The purpose of the 1980 amendment was to encourage international arbitration in Malaysia by providing a neutral a-national venue to arbitrate there (Lim, 1997). The amendment to Section 34 recognises and confirms the fact that international parties are generally reluctant to submit their disputes to arbitration in States with unfamiliar rules and procedures that may disadvantage arbitration proceeding and the enforcement of arbitral awards (Lim, 1997).

Post Accession to NYC 1958

The second significant period of regulatory framework of ICA in Malaysia followed Malaysia's accession to NYC 1958. Malaysia did not participate in the NYC 1958 Conference in New York in 1958. However, it did attend the NYC 1958 Conference as an observer as Malaysia had just achieved independence at that time (*Final Act and Convention on the*

Recognition and Enforcement of Foreign Arbitral Awards, 1958). Similar to most Commonwealth States, Malaysia is a dualist State. The application of international law in Malaysia is through the implementation of international law at the domestic level. Therefore, in Malaysia, international and domestic law work in separate and distinct spheres and legal systems. Domestic law prevails over international law at the domestic level. International law first needs to be transformed into domestic legislation through an act of Parliament before it can have a substantial and material effect on the law in Malaysia. Malaysia acceded to NYC 1958 on 5 November 1985 (UNCITRAL Secretariat, 2016). The implementing legislation enacted to give effect to it was the Convention on the Recognition and Enforcement of *Foreign Arbitral Awards Act 1985* (hereinafter, CREFA 1985), which came into force on 3 February 1986.

Implementing Act of NYC 1958: Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985. The CREFA 1985 served as the enabling act for the application of NYC 1958 in Malaysia until it was repealed by the new *Arbitration Act 2005* (hereinafter, AA 2005). The long title and preamble of CREFA 1985 clearly state that the act gives effect to the provisions of NYC 1958. The text and wording of CREFA 1985 are very similar to the model bill provided by the Commonwealth Secretariat (Patchett & Secretariat, 1981). In June 1981, the Commonwealth Secretariat distributed an explanatory paper on NYC 1958 including a commentary on the text, guidance and model legislation should the Commonwealth government decide to accede to NYC 1958. One of the apparent similarities of CREFA 1985 and the Model Bill provided by the Commonwealth Secretariat was the addition of an interpretation section. The official text of NYC 1958 does not contain any definition section. In the *travaux préparatoires* for NYC 1958, there were several attempts and suggestions by the delegation of the NYC 1958 Conference to include a definition section in NYC 1958 (Summary Record of the Seventh Meeting, 1958). The definition of the term 'convention award' in Section 2 (1) gave effect to the reservations entered by Malaysia when acceding to NYC 1958.

Nevertheless, at that time, even though Malaysia had acceded to NYC 1958, CREFA 1985 still had to be read together with AA 1952 when parties brought an action to recognise or enforce foreign awards in Malaysia. Section 3 of CREFA 1985 gave effect to NYC 1958 by stating that Malaysia would recognise and enforce an arbitral award, providing that the award was considered commercial under domestic law and the award was made in the territory of a State party to NYC 1958. However, the procedure to govern such enforcement of arbitral awards was still under the purview of AA 1952, where the court had broad supervisory powers, subject to exception of Section 34 of AA 1952. In the case of Klockner Industries-Anlagen GMBH v Kien Tat Sdn Bhd & Anor [1990] 3 MLJ 183, the High Court held that the words in Section

34 were clear and precise and the Court was excluded from exercising its supervisory function with respect to arbitration held under KLRCA Rules. Therefore, foreign awards not held under ICSID or KLCRA would be subject to supervision by Malaysian courts. The CREFA 1985 was repealed with the enactment of AA 2005. Sections 38 to 39 of the Malaysian AA 2005 are the current implementing provisions of NYC 1958.

Malaysian Arbitration Act 2005. Malaysia began the process to modernise its arbitration laws in 2004. The AA 1952 was criticised for being outmoded and more lacunae were found (Davidson & Rajoo, 2006a). Besides, there was a paradigm shift in the arbitral process with less or minimal intervention from domestic courts (Idid & Oseni, 2014b). It was common for States to adopt UML and apply it to their domestic arbitration laws.

There were heated debates in Malaysia. Different bodies were involved in proposals and engaged in discussions with the Attorney General's Office to reconstruct the new legislation. The Malaysian Bar Council preferred a single Act based on the popular UML to govern both domestic and international arbitration, as dual regime legislation would cause confusion and be against the spirit of harmonisation promoted by the international commercial community (Davidson & Rajoo, 2006b). Meanwhile, the Malaysian Institute of Arbitrators wanted separate domestic legislation based on English AA 1996 and international legislation based on UML, arguing that UML was not suitable for domestic arbitration (Davidson & Rajoo, 2006b). However, their main objective was still the same, namely, to provide Malaysia with a new Act that moved with the times (Davidson & Rajoo, 2006b).

Finally, on 30 December 2005, Malaysia enacted AA 2005, which repealed AA 1952 and CREFA 1985. The new AA 2005 adopted UML with some modifications to suit the situation in Malaysia. For instance, it is a single Act with two regimes and the primary difference is the extent of court supervision, as it acknowledges that international arbitration parties may prefer to avoid judicial intervention from Malaysian courts. In contrast, domestic arbitration would need some judicial supervision from them (Davidson & Rajoo, 2006a). The AA 2005 is influenced by the New Zealand Act 1996, also a single Act with two regimes (Davidson & Rajoo, 2006a). The spirit behind the New Zealand Act has been followed, recognising that UML is perfect for both domestic and international arbitration, hence there is no need for different Acts to be enacted. Sections 38 to 39 of the AA 2005 are the current implementing provisions of the NYC 1958, repealing the CREFA 1985.

It was a first in the Malaysian legal history of arbitration that Malaysia chose not to follow the English legislation *in verbatim*. The AA 2005 repealed and supplemented AA 1952 'to bring Malaysian arbitration law in line with modern arbitration practice' (Rajoo, 2018). Malaysia adopted an internationalist approach in adapting to the

needs of international best practice and align its adherence to provisions of UML, thus deviating from Malaysia's old regime where the courts were allowed to intervene in most arbitral proceedings (Idid & Oseni, 2014b).

Arbitration (Amendment) Act 2011 and Arbitration (Amendment) Act 2018. Malaysia amended AA 2005 in 2011 and 2018 to provide for greater clarity in arbitration law in Malaysia. The amendment in 2011 stipulates new directions on one of the grounds for the recognition and enforcement of foreign arbitral award1s. The amendment in Section 39(1)(a)(ii) replaced the word 'Malaysia' with 'the State where the award was made'. Therefore, the courts in Malaysia may refuse to enforce any award on the ground that an arbitration agreement is invalid under the laws of the State where the award was made. The amendment is compatible with Malaysia's obligation to transform the ground under Article V (1) (a) of NYC 1958 into domestic law. In the case of Food Ingredients LLC v Pacific Inter-Link Sdn Bhd [2012] 8 MLJ 585, where the Plaintiff sought to enforce in Malaysia awards made in England, the Court held that the new amendment to Section 39 of the Act was applicable to the proceeding filed on 2 August 2011.

Also, an amendment to Section 39 (3) stipulates that part of an award which contains a decision on a matter submitted to arbitration may be recognised and enforced subject to the possibility that the decision may be separated from a part where the parties agreed not to submit to arbitration. This additional amendment also portrays Malaysia's efforts to conform to Article V (1) (c) of NYC 1958. Malaysia amended AA 2005 once again in 2018 to note the change in the name of KLRCA to the Asian International Arbitration Centre (AIAC).

The Recognition and Enforcement of Foreign Arbitral Awards in Malaysia

The main attraction of ICA is its universal enforceability of the foreign awards provided by the NYC 1958, having 161 contracting States to date. Sections 38 to 39 of AA 2005 govern the recognition and enforcement of foreign awards in Malaysia. The AA 2005 serves as a single regime for the recognition and enforcement of domestic and foreign arbitral awards (Das, 2007). Section 38(1), when reading together with Section 38(4), stipulates that an award made in a foreign State which is a party to NYC 1958 shall be recognised and enforced as a judgment. These provisions reflect the scope and reciprocity reservation entered by Malaysia. Malaysia declared two reservations when it first acceded to NYC 1958 in 1985: (1) the reciprocity reservation whereby Malaysia would only apply NYC 1958 to awards made in the territory of another contracting State; and (2) the commercial reservation where Malaysia would only apply NYC 1958 when considering differences arising out of a legal relationship considered as commercial under its domestic law.

The first reservation entered by Malaysia was that it would only enforce arbitral awards made in the contracting State. Section 38 (1) states that an award

where the seat of arbitration is in Malaysia or a 'foreign State' will be recognised and enforced. Even though the term foreign award seems to accommodate the needs of international arbitration, Section 38 (4) of AA 2005 then defines 'foreign State' as a State that is one of the contracting States of NYC 1958. Section 38(4) gave effect to the first reservation entered by Malaysia when acceding to NYC 1958 in 1985. The second reservation entered by Malaysia concerns the application of NYC 1958 only to matters considered as commercial under domestic law. The AA 2005 is silent on the definition of commercial reservation. Section 5 of the Malaysian Civil Law Act 1956 (hereinafter, CLA 1956) specifies the application of English Law in commercial matters in Malaysia. Section 5(1) defines commercial matters as "the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally".

Section 38(1) the Malaysian AA 2005 states that an arbitral award where the seat of arbitration is Malaysia or from a foreign State must be recognised as binding and enforced by entry as a judgment. Section 38(2) stipulates the rules of procedure for enforcing arbitral awards, which is by application in writing to the High Court in Malaysia with conditions similar to Article IV of NYC 1958. Section 38 is a comprehensive section dealing with both domestic and international awards (Rajoo, 2016). Foreign awards made by NYC 1958 contracting States will be fully recognised and enforced in accordance with the conditions provided by NYC 1958 and under the rules of procedure of Malaysia.

Recent cases have shown that Malaysian courts have been applying Section 38 of AA 2005 using a 'pro-enforcement' stance. In 2016, the Malaysian Court of Appeal in the case of Alami Vegetable Oil Products Sdn Bhd held that Section 38 was a recognition procedure in order to convert an arbitral award into a judgment. The judges also held that as Section 38 was a procedural provision to seek recognition of an award, and as long as there was an award, then the procedure in Section 38 was satisfied and the award needed to be recognised. Recently, in 2018, the Court of Appeal in the case of Jacob and Toralf Consulting Sdn Bhd & others v Siemens Industry held there was nothing in Section 38 of AA 2005 to permit registration of a partial award, except Section 39(3) where a judgment was made on matters not submitted to arbitration and awards were separable, and allowed the appeal to set aside the judgment of the High Court. More importantly, in relation to Section 38 of AA 2005, the judges recognised that having complied with the requirements under Section 38, the registration of an international arbitration award is granted as of right to the appellants unless the respondents are able to show any other reason to refuse enforcement as provided under Section 39 of AA 2005.

There are two ways in which an applicant wishing to have an arbitral award recognised or enforced may start the application in

Malaysia. First, is to file the originating summons under Order 28 read together with Order 69 of the Malaysian *Rules of Court 2012* (hereinafter, ROC 2012) (Mah & Navaratnam, 2016). This procedure applies to all arbitral awards, regardless of whether an award is considered domestic or foreign in Malaysia. The arbitration procedure for enforcement of awards under Section 38 of AA 2005 is an arbitration claim under Order 69 Rule 2(1)(k).

The second way is for an applicant to apply to recognise or enforce a foreign award under Order 69 Rule 8 of ROC 2012. Rule 9 states that an applicant may enforce an award that has become enforceable in the same manner as a judgment given by a court where the award was made under Order 69 Rule 8. The title of this order explicitly means that this procedure is only applicable to the recognition and enforcement of foreign awards. The Malaysian courts portray a positive 'pro-arbitration' attitude to the recognition and enforcement of award where the High Court shows a relaxation in procedural matters regarding recognition and enforcement of the said award. The court in Armada (Singapore) Pte Ltd also held that the omission to include the endorsement order under Order 69 Rule 8 (8) did not nullify the arbitral award. In its judgment, the High Court held that failure to comply with procedural requirements should not be cause for invalidating an action unless it resulted in a substantial miscarriage of justice.

Despite applying a formalistic and strict approach to having to satisfy both requirements of evidence specified under Section 38 of AA 2005, the Malaysian courts have consistently allowed the recognition and enforcement of foreign arbitral awards subject to the fulfilment of prima facie requirements. For instance, in the case of Sisma Enterprise Sdn Bhd v Solstad Offshore Asia Pacific Ltd, the Court allowed the defendant's application for recognition and enforcement of an award after being satisfied that formal requirements had been satisfied as the defendant had submitted a certified copy of the final award and a duly certified copy of the arbitration agreement. In Agrovenus LLP v Pacific Inter-Link Sdn Bhd, the Court of Appeal allowed the appellant's appeal to recognise and enforce an award in accordance with Section 38. The court also held that despite there being an objection to the jurisdiction of the arbitral tribunal from the defendant, the Court accepted a formalistic approach of compliance with Section 38 as a *prima facie* proof where the appellant produced a copy of the award and the sale contract relating to the transaction containing an arbitration agreement.

In Malaysia, a party wishing to oppose the recognition or enforcement of a foreign arbitral award must prove one or more of the limited grounds available under Section 39. The Malaysian court in the case of International Bulk Carriers Spa v Cti Group held that subject to strict compliance to *prima facie* requirements under Section 38 of Malaysian AA 2005, a foreign award in Malaysia could only be challenged using the limited grounds specified under Section

39 of Malaysian AA 2005. The court also took a strict and narrow approach in an application to set aside an award in the case of Armada (Singapore), where the Court rejected the application to challenge the validity of the award and held that the proper channel to challenge its validity was an English Court, the supervisory Court. In the case of Jacob and Toralf Consulting, the court highlighted the extensive nature of the grounds stated in Section 39 of Malaysian AA 2005 which must have been intended to be exhaustive in refusing the recognition and enforcement of a foreign arbitral award. The court, in that case, declined the request to refuse registration of the award as the defendant did not raise any of the grounds in Section 39 of Malaysian AA 2005. Looking at how positive is the attitude of the courts is to applications to enforce foreign arbitral awards in recent cases in Malaysia, the Malaysian courts' position pertaining to the recognition and enforcement of foreign arbitral awards are at par with international best practice.

CONCLUSION

The regulatory framework of ICA in Malaysia involves two significant periods: (1) pre-accession to NYC 1958 and (2) post-accession to NYC 1958. The first period ranged from the first arbitration legislation in Malaysia, the Arbitration Ordinance XIII of 1809, until AA 1952. The first period shows that Malaysia never left the hindsight of its former colonial ruler and always chose to follow the English arbitration domestic legislation word by word. Malaysia used to have broad discretionary power to intervene in arbitration proceedings. However, Malaysia started to realise that the world of international arbitration had now shifted to needing a neutral arbitration process with minimal intervention from the courts. The amendment to AA 1952 in 1980 reflected Malaysia's efforts to promote ICA, as well as Kuala Lumpur as a neutral seat for arbitral proceedings with zero intervention from domestic courts. However, the amendment to Section 34 was not comprehensive as it only covered arbitration held under KLRCA and did not differentiate between domestic and international arbitration.

The second period of regulatory framework of arbitration laws in Malaysia starts after Malaysia's accession to NYC 1958 in 1985. Malaysia was an observer at the NYC 1958 Conference in 1958 as it had just gained independence at that time. Malaysia acceded to NYC 1958 on 5 November 1958. Malaysia is a dualist State where international law needs to be transformed into domestic law before it can have a direct effect. Malaysia subsequently enacted CREFA 1985 as implementing legislation. The CREFA 1985 was textually similar to the provisions of NYC 1958, but additionally includes a definition section provided by the Commonwealth government in 1981. Even though CREFA 1985 governed the recognition and enforcement of foreign awards in Malaysia, the parties applying to recognise or enforce an award needed to conform to the procedures under AA 1952. The case of Klockner Industries-Anlagen GMBH held that Malaysian

courts were excluded from exercising judicial supervision over arbitration held under KLRCA rules. Therefore, any other arbitration including ICA which was not held under KLRCA rules was still under the purview of Malaysian domestic courts.

Due to the increasing numbers of international contracting parties, and pressure from the Malaysian Bar Council and Malaysian Institute of Arbitrators, Malaysia joined the UML community by enacting new modernised legislation, AA 2005. In 2005, Malaysia enacted AA 2005, which is a single regime covering both domestic and international arbitrations. The AA 2005 was influenced by the New Zealand Act 1996. For the very first time in arbitration, Malaysia chose not to adopt English arbitration legislation. Sections 38 to 39 of the AA 2005 currently governs recognition and enforcement of foreign awards in Malaysia, repealing the CREFA 1985.

Malaysia enacted sections 38 to 39 of the AA 2005 to reflect its obligation to recognise and enforce foreign arbitral awards pursuant to its accession to NYC 1958. Parties wishing to recognise or enforce a foreign arbitral award in Malaysia may opt either to apply under REJA 1958 or AA 2005. Comparatively, the procedures under Section 38 of AA 2005 is more straight-forward as it follows the requirements stipulated under the 1958 and UML. Unlike previous regime, the enforcement and recognition of foreign arbitral awards in Malaysia is now straight-forward and the courts were seen to have consistently adopted 'pro-enforcement' attitude in the application to enforce foreign arbitral awards. With the recent amendments in 2011 and 2018, Malaysia's laws on arbitration continue to conform to the best practice of international arbitration. In conclusion, the legal framework of ICA in Malaysia has now moved forward and gone well beyond the earlier adopted common law system of England. Malaysia's latest arbitration legislation, AA 2005 is a modern arbitration legislation that conforms to international best practice.

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