

ARBITRATION

THE ARBITRATION (AMENDMENT) ACT 2024 AND THE KEY CHANGES TO MALAYSIAN ARBITRATION PRACTICE & PROCEDURE

Published on 29 August 2024

INTRODUCTION

Awaiting Royal Assent and publication in the Federal Gazette, the Arbitration (Amendment) Bill 2024 which will be cited as the [Arbitration \(Amendment\) Act 2024 \("2024 Act"\)](#)¹ will make significant changes to the Arbitration Act 2005 ("2005 Act").

The 2024 Act will introduce several key changes to the previous arbitration framework and landscape to "enhance Malaysia's standing amongst the global international arbitration community by improving the organizational structure of the [AIAC] in line with" the Supplementary Agreement between the Government of Malaysia ("GOM") and the Asian-African Legal Consultative Organization ("AALCO")² "by harmonizing the provisions of the [Arbitration Act 2005] with" UNCITRAL Model Law, and by "introducing provisions on third party funding."³ In addition to the stated goals in the Explanatory Statement, the 2024 Act also improves governance of the Asian International Arbitration Centre ("AIAC") through the restructuring of the AIAC with the doctrine of separation of powers and to improve checks and balances in the AIAC's administration.⁴

This article sets out some of the key changes to be introduced in the 2024 Act.

REFORMS AND RESTRUCTURING OF THE AIAC

For background context, the GOM and AALCO signed a Supplementary Agreement on 20th February 2024 to reform the governance structure of AIAC by enhancing the check and balance mechanism and facilitating the establishment of a clear separation of responsibilities within the AIAC ("Supplementary Agreement").⁵ Amongst these agreed reforms to be implemented are:-⁶

- (i) the replacement of the existing Advisory Board with a Board of Directors to oversee operation and business strategy of the AIAC and to ensure good corporate governance;
- (ii) the introduction of the position of Chief Executive Officer to manage day-to-day operations of the AIAC;
- (iii) the formation of the AIAC Court of Arbitration ("AIAC Court");
- (iv) the current position of the Director of the AIAC to be replaced by the President of the AIAC Court;

¹ See Section 1(1) of the Arbitration (Amendment) Act 2024

² The Asian-African Legal Consultative Organization

³ See paragraph 1 of the Explanatory Statement to the Arbitration Amendment Bill 2024

⁴ See [Hansard \(15th Parliament, 3rd Session, 2nd Meeting on 16.07.2024\)](#) at pp. 123-124

⁵ See Supplementary Agreement, Recital B

⁶ See Supplementary Agreement, Recitals D and E

- (v) the introduction of the position of Vice President of the AIAC Court; and
- (vi) the appointment of arbitrators, mediators and adjudicators to be made by the President in consultation with members of the AIAC Court and for the Vice President to undertake the duties of the President in his absence.

Subsequently on 1st June 2024, the Legal Affairs Division of the Prime Minister's Department established the Protem Committee for the AIAC Court to "*spearhead the fundamental mandate of establishing the AIAC Court, including streamlining the mechanism, protocol and operational framework of the AIAC Court.*"⁷

In line with these proposed reforms, section 2 of the 2024 Act introduces and defines the post of "President" as the President of the AIAC Court. The Director's current function to appoint arbitrators will be assumed by the President⁸ and all appointments, decisions or any other acts made, given or done by the Director before the 2024 Act's coming into operation shall (on the date of coming into operation of the 2024 Act) be deemed to be made, given or done by the President.⁹

Further to the above, it is noted that section 11 of the 2024 Act amends section 48 of the 2005 Act by substituting the words "*The Director of the Asian International Arbitration Centre (Malaysia) or any other person*" with the words "*Any person*". This will provide in general that any person or institution, including the President, acting in the capacity of an appointing authority authorised by the parties shall not be liable for anything done or omitted in the discharge of the function unless shown to have been in bad faith.¹⁰

MULTIPARTY ARBITRATIONS AND APPOINTMENT OF ARBITRATORS BY THE PRESIDENT

Recognizing the complexity of contractual relationships and disputes which can involve multiple or a combination of parties, section 6(a) of the 2024 Act seeks to "*provide clarity with respect to the appointment of arbitrators*"¹¹ by providing for a situation where there are multiple claimants or multiple respondents. In cases such as these, all the claimants shall jointly appoint one arbitrator and all the respondents shall jointly appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator as the presiding arbitrator.¹²

The 2024 Act also moves the appointing authority of arbitrators from the current Director to the President.¹³ This is done by substituting the term "*Director of the Asian International Arbitration Centre (Malaysia)*" with the word "*President*". This is in line with the spirit of the restructuring initiatives underway at the AIAC which "*strives to enhance the transparency, efficiency and good governance with respect to the appointment processes pursuant to the formalization of the Supplementary Agreement*".

THIRD PARTY FUNDING ARRANGEMENTS AND CHAMPERTY

Section 10 of the 2024 Act introduces a new Chapter 2 in Part III of the 2005 Act making provisions to regulate third party funding.¹⁴ The 2024 Act will provide that the common law rule against maintenance and champerty shall cease to apply meaning that future (not

⁷ Media Statement dated 1st June 2024

⁸ Section 6 of the 2024 Act which amends section 13 of the 2005 Act. See also: Supplementary Agreement, Recital D

⁹ Section 12(1) of the 2024 Act

¹⁰ Paragraph 12 of the Explanatory Statement to the 2024 Act

¹¹ Paragraph 7 of the Explanatory Statement to the 2024 Act

¹² Section 6(a) of the 2024 Act amends and introduces a new sub-section 13(3A) to the 2005 Act

¹³ Section 6(b) to (g) of the 2024 Act which amends sub-sections 13(4), (5), (6), (7), (8) and (9) of the 2005 Act

¹⁴ Paragraph 11 of the Explanatory Statement to the 2024 Act

past)¹⁵ third party funding agreements shall not be treated as being contrary to public policy on the grounds of maintenance and champerty.¹⁶

Where a third party funding agreement has been entered into, the funded party must disclose or communicate to the other party and the tribunal or court before which proceedings are brought in respect of the arbitration the fact such an agreement has been made and the name of the third party funder.¹⁷ Where the agreement was made on or before the commencement of proceedings, the disclosure must be made upon commencement of such proceedings.¹⁸ Conversely, where the agreement is made after commencement, the disclosure must be made within 15 days after the agreement is made.¹⁹ Disclosure is also required where a third party funding agreement is terminated or comes to an end.²⁰

To regulate third party funding, the Minister may issue, revoke, vary, revise or amend a code of practice setting out the practices and standards parties and third party funders are expected to comply. ²¹ Non-compliance with sections 46F (Disclosure of information for purpose of seeking or securing third party funding), 46G (Disclosure on third party funding agreement) and 46H (Disclosure of termination or end of third party funding agreement) of the 2024 Act shall not, in itself, render any third party funder liable to any action or legal proceedings.²²

AUTOMATIC RECOGNITION OF ARBITRATION AWARDS

This amendment seeks to harmonise the current section 38 of the 2005 Act with the UNCITRAL Model Law. Under current law, an application in writing needs to be made to the High Court pursuant to section 38 of the 2005 Act to have an award be recognized as binding and be enforced as a judgment. Section 9 of the 2024 Act would amend section 38(1) of the 2005 Act such that an award whose seat of arbitration is in Malaysia or from a foreign State shall be automatically recognized as binding without the need for an application to recognize the award, in line with the UNCITRAL Model Law. Upon an application in writing to the High Court, such award shall be enforced subject to section 39 of the 2005 Act.

FORM OF ARBITRATION AGREEMENT

Section 4 of the 2024 Act amends section 9(4)(b) of the 2005 Act by widening the form of an arbitration agreement in writing by adding "*any other documents*". This is to broaden the ambit of the provision to take cognizance of the existence of an arbitration agreement in writing, even if it is contained in an exchange of documents between the parties other than the exchange of statement of claim or defence.²³

LAW APPLICABLE TO ARBITRATION AGREEMENT

To avoid any uncertainty or complications on the law applicable to the arbitration agreement, section 5 of the 2024 Act will introduce a new section 9A to the 2005 Act which provides that parties are free to agree on the applicable law. Absent such agreement, the law applicable to the arbitration agreement shall be the law of the seat of the arbitration.

¹⁵ Section 46B of the 2024 Act provides this Chapter applies prospectively and not to any third party funding agreement made before the date of commencement of Chapter 2

¹⁶ Section 46C(1) of the 2024 Act

¹⁷ Section 46G(1) of the 2024 Act

¹⁸ Section 46G(2)(a) of the 2024 Act

¹⁹ Section 46G(2)(b) of the 2024 Act

²⁰ Section 46H of the 2024 Act

²¹ Section 46D(1) and (4) of the 2024 Act

²² Section 46I(2) of the 2024 Act

²³ [AIAC Announcement dated 26th July 2024](#)

DIGITAL & ELECTRONIC SIGNATURES

To keep abreast with developments in modern technology and facilitate borderless transactions, section 8 of the 2005 Act will amend section 33 of the 2005 Act by permitting the use of digital signatures²⁴ and electronic signatures²⁵ by arbitrators on arbitral awards. This serves to streamline the arbitral process towards greater efficiency especially in the context of international arbitration across jurisdictions.²⁶

REPETITION OF HEARINGS IF ARBITRATOR(S) REPLACED

Under the current section 17(2) of the 2005 Act, where a single arbitrator or the presiding arbitrator is replaced, any hearings previously held shall unless otherwise agreed by the parties be repeated before the substitute arbitrator. Where however an arbitrator other than a single or presiding arbitrator is replaced, unless otherwise agreed by the parties, it is subject to the discretion of the arbitral tribunal whether hearings are to be repeated.

Section 7 of the 2024 Act will substitute the current section 17(2) of the 2005 Act to provide that regardless where any arbitrator (including the presiding arbitrator) is replaced, hearings previously held may be repeated at the discretion of the arbitral tribunal. Unlike the current regime where it is mandatory to repeat hearings unless otherwise agreed by the parties, the 2024 Act will give the arbitral tribunal more discretion whether to repeat the hearing. This gives more discretion and potentially prevents delay from repeating hearings thus reducing the time taken to conclude arbitral proceedings.

CONCLUSION

In conclusion, the 2024 Act once enacted and in effect would introduce some rather significant changes to the arbitral regime in Malaysia and bring it in line with international best practices and norms.

Authors:



[Daniel Lau Hsien Yuong](#)



[Aqesh Krishendra Jeyaratnam](#)



[Noor Sumaeya Sofea Shamsudin](#)

Disclaimer: The contents do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such.

²⁴ As defined in the Digital Signature Act 1997

²⁵ As defined in the Electronic Commerce Act 2006

²⁶ [AIAC Announcement dated 26th July 2024](#)