AN OVERVIEW OF EMERGING ARBITRATION JURISDICTIONS: PART I

Over the course of the past 40 years, arbitration, as an international dispute resolution mechanism, has gained significant global traction. Certain jurisdictions, such as London, Hong Kong, Singapore, Geneva, and New York, are considered arbitration powerhouses, not only for being home to preeminent arbitration firms and boutiques, but also due to the strength of the *lex arbitri*, and the relevant supporting framework, in promoting these jurisdictions as preferred seats of arbitration. Nevertheless, the role of the UNCITRAL Model Law in harmonising the global arbitration framework, as well as the proactiveness of individual arbitral institutions and the support of the judiciary, has enabled lesser-known jurisdictions to reposition themselves as emerging centres ready to have a piece of the proverbial "arbitration pie". In this regard, the AIAC decided to dedicate a portion of this Newsletter and the next edition thereafter to survey emerging arbitration jurisdictions, through the lens of leading practitioners from the relevant jurisdictions. Part I of this survey is showcased in this edition of the AIAC Newsletter and canvasses four emerging jurisdictions in the Asia-Pacific region – Malaysia (by Tan Sri Dato' Cecil Abraham) ("CA"),[1] the Philippines (by Patricia-Ann T. Prodigalidad) ("PP"),[2] Thailand (by Vanina Sucharitkul) ("VS"),[3] and Vietnam (by Dzung Mahn Nguyen) ("DN").[4]

1. ***What legislation applies to arbitrations in your jurisdiction? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration?***

CA: There are two Acts in force in Malaysia, namely the Arbitration Act 1952 ("1952 Act") and the 2005 Arbitration Act ("the Act"). The Act is based on the Model Law and the New Zealand Arbitration Act 1996. The 1952 Act only applies to arbitrations commenced prior to 15th March 2006.

The Act applies to both domestic and international arbitrations. It is divided into four parts. Part I contains the definition section, including important definitions of international arbitration and domestic arbitration. Parts I, II and IV apply to all arbitrations. Part III, which contains the provisions for appeals from arbitration awards on points of law, applies only to domestic arbitrations unless the parties opt-out. It does not apply to international arbitrations unless the parties opt-in.

Section 3 of the Act makes the main distinction between international and domestic arbitrations and sets out the territorial limits and scope of the Act. This section incorporates the provision for opting-in and opting-out of Parts I, II and IV of the Act in respect of domestic and international arbitrations, where the seat of the arbitration is in Malaysia. There is no equivalent provision to Section 3 of the Act in the 1952 Act. The 1952 Act applies both to domestic and international arbitrations.

PP: International commercial arbitration, as that term is universally understood, is generally governed by Republic Act No. 9285 (otherwise known as the "ADR Act of 2004" or simply the "ADR Act") and its implementing rules and regulations. The ADR Act expressly adopted the UNCITRAL Model Law on International Commercial Arbitration, as adopted on 21st June 1985 and approved on 11th December 1985 ("1985 UNCITRAL Model Law").

Domestic arbitration, on the other hand, is governed by Republic Act No. 876 (known as "The Arbitration Law"), as amended by the ADR Act. Arbitration of construction disputes, even if within the definition of a commercial dispute, is governed by Executive Order No. 1008 (EO 1008), or the "Construction Industry Arbitration Law" of the Philippines, as well as by the procedural rules promulgated by the Construction Industry Arbitration Commission (CIAC). The primary laws governing domestic and construction arbitrations are not patterned after the UNCITRAL Model Law.

All forms of arbitration are likewise governed by the decisions of the Philippine Supreme Court ("SC") interpreting the aforesaid laws, as these judicial pronouncements form part of the country's legal system.

Judicial proceedings arising from, relating to, or otherwise connected with an arbitration proceeding (such as applications for interim measures of protection) are governed by the SC's Special ADR Rules.

Tan Sri Dato' Cecil Abraham

Vanina Sucharitkul

Dzung Mahn Nguyen

Patricia-Ann T. Prodigalidad

[1]Tan Sri Dato' Cecil Abraham is the Senior Partner at Cecil Abraham & Partners (Malaysia). His career at the Malaysian Bar spans 50 years. His practice covers a wide breadth of areas that includes Corporate and Commercial, Environmental, Banking and Securities, Insurance, Maritime, and Competition Law as well as Arbitration. Tan Sri Dato' Abraham is also regularly appointed as an arbitrator in domestic and in international commercial arbitrations and is the only Malaysian to be regularly appointed as an arbitrator in investment treaty disputes.

[2]Patricia-Ann T. Prodigalidad is a Senior Partner at Accra Law (Philippines). She specialises in commercial litigation, white collar crime, intra-corporate disputes, banking, investments and securities litigation, anti-money laundering, corporate rehabilitation and insolvency, international commercial and construction arbitration, and intellectual property and antitrust litigation. Ms. Prodigalidad also acts as an arbitrator in international commercial and domestic arbitration, both institutional and ad hoc, as well as in Philippine construction arbitration.

[3]Vanina Sucharitkul specialises in international arbitration and advises clients on a diverse range of commercial litigation and cross-border disputes across involving commercial contracts, investigations and anti-corruption, joint ventures, hospitality, construction and infrastructure projects, environmental contamination, and investment treaty arbitration. She has experience acting as counsel and advocate in arbitrations across multiple jurisdictions under the auspices of institutions including the ICC, SIAC, HKIAC, AAA, and TAI. Ms. Sucharitkul serves as a Member of the International Court of Arbitration of the International Chamber of Commerce (ICC) and is currently sitting as arbitrator.

[4]Dzung Mahn Nguyen recently established ADR Vietnam Chambers LLC, a new platform for full time & independent arbitrators and mediators in Vietnam. He also founded Dzungsrt & Associates LLC in 1997 which has now become one of the leading arbitration law firms in Vietnam. Mr. Nguyen has served as an expert witness, and legal counsel in international arbitrations conducted under various international arbitration rules such as ICC, SIAC, JCAA and UNCITRAL and he has also been appointed as co-arbitrator and presiding arbitrator in VIAC arbitrations. He has assisted international clients in pursuing enforcement proceedings in Vietnam of many arbitral awards rendered by the ICC, ICA, GAFTA, JCAA, LMAA and SIAC.

VS: The Thai Arbitration Act (B.E. 2545) (2002) governs all arbitrations seated in Thailand. It is substantially based on the UNCITRAL Model Law with some minor exceptions. For example, an arbitrator may face civil liability for willful and gross negligence.[5] If an arbitrator demands or accepts benefits without lawful justification, he or she could be subject to criminal and civil liabilities.[6]

DN: Arbitration in Vietnam is mainly governed by Law No. 54/2010/QH12 on Commercial Arbitration ("LCA") which further guided by Resolution No. 01/2014/NQ-HDTP of the Supreme People's Court of Vietnam ("Resolution No. 01").

With regard to the enforcement of arbitral awards (both domestic and foreign arbitral awards), the Law on Enforcement of Civil Judgments 2008, as amended in 2014 ("LECJ") shall be applied. However, the foreign arbitral awards must seek recognition by the Vietnamese Court before being coercively enforced in Vietnam. The recognition of foreign arbitral awards is regulated by Part Seventh (VII) of Civil Procedure Code 2015 ("CPC") which came into force on 1st July 2016 which incorporates provisions of New York Convention 1958.

Although not officially recognised by the UNCITRAL as a Model Law country, the LCA was drafted based on the 1985 UNCITRAL Model Law as amended in 2006 ("UNCITRAL Model Law") with some local adaptations regarding the language of arbitration, the conditions for applying for interim reliefs, the grounds for setting aside arbitral awards, etc.

2. In your practice when dealing with domestic arbitration, have you experienced more ad hoc or institutional arbitrations? If so, which arbitral institution(s) is/are commonly used to resolve commercial disputes in your jurisdiction? In your opinion, how effective are the products and services offered by the named institution(s)?

CA: In the context of domestic commercial arbitrations, many cases have been subject to institutional arbitration rather than ad hoc arbitrations. Most of the domestic arbitration cases have been under the auspices of the Kuala Lumpur Regional Centre for Arbitration ("KLCRA"), now known as the Asian International Arbitration Centre ("AIAC"). The product and services offered by the AIAC have been effective.

PP: Based on my experience, domestic arbitration is generally institutional. As to which arbitration is more commonly involved, such depends on the nature of the dispute. For construction disputes, EO 1008 expressly vests unto CIAC original and exclusive jurisdiction over disputes arising from, or connected with, contracts involving construction in the Philippines. In view of EO 1008 and the seemingly compulsory jurisdiction of the CIAC (as pronounced by the SC), construction arbitration in the country is generally conducted under the auspices of the CIAC.

For non-construction disputes, the institutions vary. Although there are a number of arbitration centres in the country, the preeminent and dominant arbitration institution based in the Philippines is the Philippine Dispute Resolution Center, Inc. ("PDRC"), which is thus a frequent and popular choice among contracting parties. There are times, however, when the parties choose foreign institutions to administer the arbitration even if the seat remains to be in the Philippines.

In my opinion, the CIAC and the PDRC are effective in administering the arbitrations commenced before them and have been very responsive to the needs of its users. For example, when the COVID-19 pandemic struck and total lockdowns were imposed, these institutions quickly shifted to virtual proceedings and, thus, ensured that delays and disruptions were, if any, minimal. Moreover, these institutions are typically able to render awards within relatively short time frames, and these awards are generally sustained despite challenges made before higher courts.

VS: In practice, the use of ad hoc arbitration in Thailand is not as common as institutional arbitration. The most widely used arbitral institution is the Thailand Arbitration Institute ("TAI"), founded in 1990 and operated under the Office of the Judiciary. Although the costs are minimal, proceedings under the TAI can be rather inefficient with procedural delays compared to other regional institutions. This has opened the door for guerrilla tactics, particularly when it comes to frivolous challenges of arbitrators. In 2017, the TAI updated its Arbitration Rules to promote efficiency and deal with the procedural loopholes. Electronic filings and online document management platforms were also introduced. In 2017, the TAI conducted 115 cases. In 2019, it released amendments to its 2017 Arbitration Rules to increase the efficiency, transparency and predictability of TAI administered arbitrations.

In 2013, the Thailand Arbitration Centre (THAC) was established under the Ministry of Justice with its Arbitration Rules enacted in 2015. The THAC aims to attract international arbitrations with its competitive fees and state of the art hearing facilities in the centre of Bangkok. Although still in its early stages, it has been taking dynamic steps by holding regular conferences and trainings – over 50 since 2016. These include a training event in collaboration with the New York University School of Law and UNCITRAL. The THAC now runs its own annual ADR series. While the THAC has been very active, it remains to be seen how widely the THAC Arbitration Rules will be applied in contracts. To date, the THAC has already been used as a hearing facility in a number of proceedings and has registered close to 50 cases.

DN: Arbitration in Vietnam is often conducted in the form of institutional arbitration. Ad hoc arbitration is rarely used. Among 31 arbitration institutions in Vietnam,[7] Vietnam International Arbitration Centre ("VIAC") is the leading and most commonly used arbitration centre.

The current VIAC Rules of Arbitration adopt international best practice, such as rules on multiple contracts (Art. 16), consolidation (Art. 15) and expedited procedure (Art. 37).[8] It has also been observed that in certain VIAC-administered matters involving international arbitral tribunals, the proceedings have been conducted in accordance with high-quality international standards, for example, having Procedure Orders issued and applying the IBA Rules on the Taking of Evidence.

According to VIAC's Report, the average duration of an arbitral proceeding conducted at VIAC is less than six (6) months. VIAC is also one of the first arbitration institutions in Vietnam to have issued its own Code of Ethics for Arbitrators.

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[5] Section 23 of the Thai Arbitration Act, 2002 (B.E. 2545) (AA).
[6] *Idem*
[7] The information of 31 arbitration institution can be found at the Web Portal of Ministry of Justice at <https://bttp.moj.gov.vn/qt/Pages/trong-tai-tm.aspx?Keyword=&Field=&&Page=4>, accessed on 22 July 2020.
[8] The VIAC's Rule of Arbitration can be found at the Web Portal of VIAC at <http://viac.org.vn/en/rules-of-arbitration.html>, accessed on 22 July 2020.

3. What, if any, requirements must be met by an individual to become an arbitrator in your jurisdiction? Are there any barriers for foreign practitioners to serve as arbitrators or parties' representatives in your jurisdiction?

CA: Neither Act imposes any special qualification requirements on arbitrators. Section 13 of the Act provides that no person shall be precluded by reason of nationality from acting as an arbitrator unless there is an agreement to the contrary. Arbitrators also do not need legal training. However, parties may contractually agree that arbitrators shall have specific qualifications by specifying this in their arbitration agreement or clause. It has also been suggested that as a matter of a minimum standard, an arbitrator must possess knowledge of the subject matter of the dispute.[9] Nevertheless, the High Court in *Sebiro Holdings Sdn Bhd v Bhag Singh & Anor* has held that the qualification of an arbitrator cannot be challenged in the absence of a clause to the contrary.[10]

Section 37A of the Legal Profession Act 1976, has no restrictions for international arbitrators and lawyers to participate in arbitral proceedings in Malaysia. This is implicitly reflected in Section 3A of the Act which specifies that a party to an arbitral proceeding may be represented by any party unless otherwise agreed by the Parties.

The AIAC prefers that the arbitrators listed on its panel to have sufficient arbitration training. Arbitrators are encouraged to be Fellows of the Chartered Institute of Arbitrators, and a number of the arbitrators are Chartered Arbitrators.

PP: Strangely, the requirements to be an arbitrator appear to differ depending on whether the proceeding is a domestic arbitration or otherwise. Notably, the ADR Act does not provide for any requirement to qualify as an arbitrator other than neutrality, impartiality and independence. However, under the old Arbitration Law (that governs domestic arbitration), an arbitrator must be "of legal age, in full enjoyment of his civil rights and know how to read and write". More importantly, the Arbitration Law further lists certain disqualifications such as relationship by blood or marriage, financial or fiduciary interest in the controversy as well as any personal bias that may prevent a fair and impartial award. For construction arbitration before the CIAC, however, the procedural rules provide that arbitrators shall be "persons in whom the business sector, particularly the stake holders of the construction industry and government, can have confidence" and "shall possess the competence, integrity and leadership qualities to resolve any construction dispute expeditiously and equitably". Nevertheless, for construction arbitration before CIAC, only CIAC-accredited arbitrators may be appointed.

Despite the foregoing, individuals who wish to be accredited in arbitral institutions in the Philippines must comply with their respective accreditation processes and requirements.

Foreign practitioners are not disqualified from serving as arbitrators in the Philippines, regardless of whether domestic, international commercial or construction arbitration. As to serving as a party representative, there is likewise no limitation due to nationality. However, such representative may not engage in the practice of Philippine law, which profession is limited to its citizens. Thus, foreign legal representatives, unless admitted to the Philippine bar, shall not be authorised to appear as counsel in any Philippine court or any quasi-judicial body even if in relation to the arbitration.

VS: The Thai Arbitration Act prescribes independence and impartiality as a minimum requirement for an arbitrator, along with any other requirements that may be applicable as per the parties' agreement or the applicable rules.[11] There are no other requirements for a Thai individual to become an arbitrator.

Foreign nationals, on the other hand, although permitted to sit as arbitrators, must comply with strenuous immigration and work permit laws. Foreign party representatives are also prohibited from representing clients in arbitration if the case is governed by Thai law, or the Award is to be enforced in Thailand.

However, in 2019, the Thai Arbitration Act was amended to remove certain obstacles to the participation of foreign arbitrators and party representatives in arbitration proceedings conducted in Thailand. Section 23 of the Amendment provides:

- A foreign individual appointed as arbitrator or representative in an arbitration in Thailand that is to be conducted by a government agency or organisation (like TAI or THAC), may request the agency or organisation to provide a certificate confirming this to the Thai officials for immigration and working of aliens;
- This certificate which will contain all relevant details, including the approximate duration of the arbitral proceedings, can be used to obtain a work permit allowing him or her to reside in Thailand during the time period specified in the certificate (subject to the relevant immigration laws); and
- Upon obtaining this certificate, a foreign arbitrator or representative may begin work in accordance with the applicable arbitral rules, even while his or her work permit application is pending.

It has been reported that foreign representatives have already obtained certificates and work permits under the amendment. However, cooperation between the relevant authorities, including the immigration department as well as the labour department and the arbitral institution, would be desirable to streamline the process.

In addition, the Thailand Board of Investment introduced Smart Visas for highly skilled foreign experts in 2019, a scheme that will benefit foreign arbitrators and party representatives. The Smart Visas are aimed at removing difficulties for highly-skilled foreign experts working in Alternate Dispute Resolution, including arbitrators, representatives, legal practitioners, speakers and tribunal secretaries to obtain work or re-entry permits.

DN: According to Art. 20 of the LCA, arbitrators must satisfy the following criteria:

(i) Having full civil legal capacity as prescribed in the Civil Code;
(ii) Possessing university degrees and having worked in the branches of their study majors for five years or more;
(iii) Not currently being a judge, prosecutor, investigator, enforcement officer, or official of a people's Court, of a people's procuracy, of an investigative agency or a judgment enforcement agency; and
(iv) Not being the one who under a criminal charge or prosecution or who are serving a criminal sentence or who have fully served a sentence but whose criminal record has not yet been cleared.

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[9] *Salutory Avenue (M) Sdn Bhd v Malaysia Shipyard & Engineering Sdn Bhd & Anor* suggests [1999] 7 CLJ 514.
[10] [2014] 11 MLJ 761.
[11] Section 19 of the AA.

Nonetheless, in exceptional cases, an expert with high qualifications, and considerable practical experience, who only fails to satisfy the above second requirement may still be selected to act as an arbitrator.

The foreigners who meet these requirements can serve as arbitrators in both institutional and *ad hoc* arbitrations in Vietnam since the LCA does not impose any restriction on the nationality of the arbitrator. The VIAC's list of arbitrators includes 28 foreign arbitrators. From 2015 to date, parties have appointed 38 international arbitrators, both within and outside the VIAC's list of arbitrators.

Further, as regards the representation of parties, Vietnamese law allows foreign lawyers or non-lawyers to act as parties' representative in the arbitration proceedings in Vietnam by way of a power of attorney or letter of appointment of lawyers.

4. Does the law in your jurisdiction consider certain disputes as non-arbitrable? If so, what disputes are non-arbitrable?

CA: Arbitration agreements under the Act are not limited to commercial disputes, unlike the Model Law. Section 9(1) of the Act provides that an arbitration agreement may include references which arise from a relationship "whether contractual or not".

Section 4(1) of the Act expressly declares that subject matters of disputes which are "not capable of settlement by arbitration under the laws of Malaysia" are non-arbitrable, in addition to non-arbitrable matters on public policy grounds.

The notion of arbitrability of a dispute depends on the construction that is to be given to the arbitration clause. The Malaysian courts[12] have endorsed the approach in *Fiona Trust & Holding Corporation and others v Privalov and others*.[13] The courts have held that fraud,[14] civil disputes[15] relating to acts, duty or functions carried out by a statutory body and tortious claims,[16] are arbitrable. The Federal Court[17] has held that matters falling within the scope of the summary determination procedure for defaults on a registered charge under the National Land Code 1965 are non-arbitrable on public policy considerations.

PP: Yes, the ADR Act and its implementing rules and regulations list the following disputes and/or subject-matters as non-arbitrable, namely:

- Labour disputes;
- Civil status of persons;
- Validity of a marriage or legal separation;
- Any ground for legal separation;
- Jurisdiction of courts;
- Future legitime;
- Criminal Liability;
- Future support;
- Disputes which by law cannot be compromised; and
- Disputes referred to court-annexed mediation.

VS: The Arbitration Act, in line with the UNCITRAL Model Law, merely specifies arbitrable matters as "a defined legal relationship, whether contractual or not".[18] It is generally understood that this covers matters that are civil in nature, including commercial disputes and questions arising out of contractual and business relationships. Typical examples of subjects that are normally non-arbitrable include disputes involving criminal matters, divorce, bankruptcy, business rehabilitation and the appointment of the administrator of an estate.

That being said, caution should be taken in contracts with State entities which may require cabinet approval in order to enter into an arbitration agreement pursuant to the 2015 cabinet resolution.

DN: Pursuant to Art 2 of the LCA, the following disputes can be resolved by arbitration:

(1) Disputes between parties arising from commercial activities;
(2) Disputes arising between parties at least one of whom engages in commercial activities; and
(3) Other disputes between parties which the law stipulates that it may be resolved by arbitration.

As provided by the Commercial Law, "commercial activities" are defined as activities for profit-making purposes including sale and purchase of goods, services, investment, trade promotion, etc. Therefore, matters such as criminal, administrative, matrimonial, and labour disputes are considered to be non-arbitrable. Furthermore, the dispute may be regarded as non-arbitrable if it falls within the exclusive jurisdiction of Vietnamese laws under Article 470 of the CPC, such as cases involving rights to immovable property in Vietnam. Notably, tort claims may not be arbitrable in Vietnam.

The latest Draft Resolution guiding certain provisions of Civil Procedure Code on recognition and enforcement of foreign arbitral awards of the Supreme People's Court also clarifies some disputes which are considered as non-arbitrable, such as disputes over registration or validity of patents, industrial designs, semiconductor integrated circuit layout designs, trademarks, trade names, geographical indications, and other intellectual property rights, and disputes relating to enterprise registration, and other obligations to register or notify under the Law on Enterprise.

5. What is the procedure for commencing arbitration in your jurisdiction? Does the law provide default rules governing the commencement of arbitral proceedings? Is there a period of limitation that parties should be aware of?

CA: The parties are free to agree on the procedure to be followed by the tribunal, provided the procedure does not contravene any provisions of the Act. The parties may choose institutional arbitration rules or an ad-hoc arbitration.

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[12] *KNM Process Systems Sdn Bhd v Mission Newenergy Ltd [2013] 1 CLJ 993; The Government of India v Cairn Energy India Pty Ltd & Ors [2014] 9 MLJ 149; RUSD Investment Bank Inc & Ors v Qatar Islamic Bank & Ors [2015] LNS 231.*
[13] *[2007] UKHL 40*
[14] *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2015] 5 AMR 30.
[15] *Pendaftar Pertubuhan Malaysia v. Establishment Tribunal Timbangtara Malaysia & Ors* [2011] 6 CLJ 684.
[16] *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394.*
[17] *Arch Reinsurance Ltd v Akay Holdings Sdn Bhd* (Federal Court Civil Appeal No. 02(f)-9-03/2016(W)). A charge registered under the National Land Code gives the charge an interest in the land with a statutory right to enforce its security by way of a sale of land under Sect. 253 of that Code, or by taking possession thereof under Sect. 271 in the event of the charger's default. The legal title in the land remains vested in the registered proprietor of the land until the sale or taking of possession.
[18] Section 11 of the AA.
[19] See *Amalgamated Metal Corporation Ltd v Khoon Seng Co* [1977] 2 Lloyd's Rep 310 at 317.

In the absence of procedural rules, the tribunal can conduct proceedings in a manner it considers appropriate. The procedure is laid out in Sections 20 to 29 of the Act. It is decided by the arbitrator, subject to any agreements that may have been reached by the parties, and is subject to the overriding rules of fairness and natural justice.[19]

Hearings are held orally unless parties agree to a document-only arbitration. The tribunal must hold an oral hearing if requested by the parties.

Section 25 of the Act sets out the procedure for identifying the issues in dispute. The parties normally would file the Points of Claim followed by Points of Defence and Counterclaim and other consequential pleadings. The tribunal can terminate proceedings if a Claimant fails to deliver the pleadings within the time stipulated. If the Respondent fails to deliver a defence or fails to appear at the hearing or produce documents, the tribunal may proceed with the arbitration and hand down an Award.

Each party must be notified of the hearing so that they can effectively prepare their case and make effective submissions. The arbitration should not proceed if one of the parties is not aware of the hearing.

There is also no requirement that the parties need to be represented by legally qualified persons and international lawyers can participate in arbitrations in Malaysia, save for the states of Sabah and Sarawak where there are restrictions on non-Sabah and non-Sarawak advocates.

Section 30 of the Limitation Act 1953 and any other written law relating to the limitation of actions applies to arbitrations. An arbitration agreement can include a clause requiring a dispute to be referred to arbitration within a specified period.

PP: In the absence of party agreement, the implementing rules and regulations of the ADR Act prescribe the default process by which domestic arbitration and international commercial arbitration are commenced. These implementing rules state that international commercial arbitration is commenced by the receipt by one party (that is, the respondent) of another party's (the claimant's) request to submit a particular dispute to arbitration. The commencement procedure for domestic arbitration is more detailed in view of the provisions of the old Arbitration Law (or RA 876). Domestic arbitration proceedings are commenced when the claimant delivers to the respondent a demand for arbitration containing (i) the name, address, and description of each of the parties; (ii) a description of the nature and circumstances of the dispute giving rise to the claim; (iii) a statement of the relief sought, including the amount of the claim; (iv) the relevant agreements, if any, including the arbitration agreement, a copy of which shall be attached; and (v) appointment of arbitrators and/or demand to appoint.

Notably, for institutional arbitration, the institutional rules generally provide for their respective procedures for commencement of a proceeding.

As to the statute of limitations, the Philippine Civil Code prescribes various periods for the commencement of actions. The term "action" in these statutes of limitation provisions is typically understood to refer to suits filed in the regular courts of justice. There is, as of yet, no jurisprudence available on whether the prescriptive periods for the commencement of various types of "actions" contained in the Philippine Civil Code apply to arbitrations. There is also no SC decision stating that prescriptive periods are satisfied when arbitration proceedings are commenced within these periods pursuant to the dispute resolution clauses of the agreement. There is also no clear jurisprudence on whether the commencement of an arbitration proceeding (pursuant to the parties' agreement) constitutes an extrajudicial demand that, under the Philippine Civil Code, would interrupt the running of the relevant prescriptive period (or statute of limitation). With this lack of clarity, it is recommended that contracting parties agree on this point.

VS: Procedures for commencement of an arbitration are subject to the arbitration agreement and the applicable arbitral rules. Thai courts do not refer disputes brought to the courts in breach of an arbitration agreement to arbitration of their own accord. The party against whom such court proceedings are brought may file an application to strike out the case which must be made no later than the date of filing of the defence or within the period for filing the statement of defence under the law. If the court is satisfied of the existence of the arbitration agreement and its validity, it must strike out the case. Pending the application to have the case dismissed, either party may commence arbitration or a tribunal already constituted may continue to proceed and render an award. In practice, Thai courts have shown willingness to enforce arbitration agreements and dismiss litigation that is commenced in breach of such agreements.

The period of limitation is specified in the Civil and Commercial Code depending on the type of dispute. Special care with limitation periods must be taken where contracts contain escalation clauses, since pre-arbitral negotiation or mediation, will not stop the clock for limitation.

DN: In accordance with Article 31 of the LCA, the time of commencement of arbitration proceedings, in case of institutional arbitration, shall be upon the receipt by the arbitration centre of the Statement of Claim from the Claimant. As regards ad hoc arbitration, the arbitration proceedings are deemed to have commenced when the Respondent receives the Statement of Claim from the Claimant.

In addition to the rules on determining the commencement date, the LCA requires the Statement of Claim to contain these following contents:

(a) The date on which the statement of claim is made;
(b) Names and addresses of the parties, and names and addresses of witnesses, if any;
(c) Summary of the matters in dispute;
(d) Grounds and evidence, if any, of the claim;
(e) Specific relief sought by the claimant and value of the dispute;
(f) Name and address of the person whom the Claimant selects as arbitrator or Request for an arbitrator to be appointed.

The statute of limitations to initiate arbitration proceedings is a complicated issue which shall be subject to the substantive law, such as the commercial law, the civil code, the maritime code, etc. In case the substantive law does not specify, the limitation period for commencing an arbitration shall be two years from the date of the infringement of a party's legal rights and interests.[20]

[19] See *Amalgamated Metal Corporation Ltd v Khoon Seng Co* [1977] 2 Lloyd's Rep 310 at 317.
[20] Art. 33 of the LCA.

6. What is the procedure for commencing arbitration in your jurisdiction? Does the law provide default rules governing the commencement of arbitral proceedings? Is there a period of limitation that parties should be aware of?

CA: Malaysia continues its growth as a centre for arbitration. The Act provides a coherent modern legislative framework in line with international norms and best practices. Malaysia has all the components in place to take off as a centre for international arbitration. Recent decisions of the country's courts underscore the fact that the Malaysian judiciary is now pro-arbitration.

Given the current arbitral landscape and the progressive and innovative approach taken by the AIAC in promoting Malaysia as a cost-efficient centre for dispute resolution, the country is suitably poised to tap into the significant growth of international arbitration within the member countries of the ASEAN and the Asia-Pacific region.

Section 8 of the Act expressly provides that no court may intervene in any matter governed by the Act unless otherwise provided. The Malaysian courts do not have any inherent power to take over or intervene in arbitral proceedings. This encapsulates the principles of party-autonomy and minimalist intervention by courts of law.[21] In line with these principles, it has been emphasised by the judiciary that when parties have agreed to arbitration, a court of law should be slow to interfere in the arbitration. The Malaysian courts are also taking a strict approach to intervention in arbitral proceedings in view of the provisions of Section 8 of the Act.[22]

The court can interfere if it involves obvious injustice, or where the Director of the AIAC has not made an appointment within 30 days from the request and the parties have applied to the High Court for an appointment under section 13(7) of the Act.

PP: Pursuant to express state policy in the ADR Act, and in furtherance of the SC's policy in favour of arbitration, local courts generally exhibit a pro-arbitration bias. Courts are generally supportive of the conduct of arbitration, defer to the competence of arbitral tribunals to resolve arbitrable disputes, and exercise restraint in interfering in arbitration proceedings unless specially permitted under the SC ADR Rules. The court's role in arbitration has been to complement, rather than supplant, the powers of the arbitral tribunal. Thus, courts have exhibited willingness to assist parties to an arbitration by granting applications for interim measures of protection, enforcing confidentiality obligations, and even assisting whenever coercive processes against third parties are necessary. Indeed, as allowed by the ADR Act, courts have even issued interim relief to preserve the status quo or preserve assets even before arbitration is actually commenced.

Courts' intervention is governed and necessarily limited by the ADR Act and the SC ADR Rules. Courts may not interfere beyond the powers provided in the SC ADR Rules to afford the arbitral tribunal the preeminent jurisdiction it exercises over disputes subject of an arbitration agreement.

VS: Thai courts tend to uphold arbitration agreements and dismiss attempts to undermine arbitration through court proceedings. Courts are also empowered to grant interim or provisional measures pending an arbitration.[23] Requests can be made to a court by the arbitral tribunal for a subpoena or order for submission of documents or other materials.[24]

DN: For foreign-seated arbitration, Vietnamese laws do not allow the courts to intervene in the arbitral proceedings.

Whereas, when the arbitration is administered by a foreign institution and has the seat of arbitration in Vietnam, such arbitration is still considered as a "foreign arbitration" under Vietnamese laws. According to Art. 5(5)(a) of Resolution No. 01, the Vietnamese Courts have authority to intervene in the arbitral proceedings, except for considering the annulment of arbitral awards, and registering foreign ad-hoc arbitral awards. Accordingly, local courts can intervene to assist foreign arbitrations seated in Vietnam through the:

- appointment of an arbitrator to establish an ad hoc arbitral tribunal;
- replacement of an arbitrator in an ad hoc arbitral tribunal;
- consideration of a petition against the decision of an arbitral tribunal that the arbitration agreement is void or incapable of being performed or about the jurisdiction of the arbitral tribunal;
- collecting evidence;
- granting interim reliefs; and
- summoning witnesses.

7. What are the grounds to challenge arbitral awards in your jurisdiction's local court? What is the judiciary's approach to determining whether or not to grant a challenge to an arbitral award?

CA: There is no appeals procedure against an award made in Malaysia under the Act. The only recourse is to set aside the award which must be made within ninety days of receipt of the award. The grounds for setting aside an award are set out in Section 37 of the Act, namely, the award is contrary to the public policy of Malaysia, fraud, or a breach of the rules of natural justice. Section 37 has been interpreted by our courts narrowly in the interests of ensuring finality and conclusiveness of the award made by a tribunal.

The courts have adopted a narrow test in determining whether an award should be set aside on the grounds of public policy. The error has to be of such a nature that the enforcement of the award would "shock the conscience", be "clearly injurious to the public good" or would contravene "fundamental notions and principles of justice". The other ground would be where there has been a breach of natural justice.

PP: The grounds to challenge an arbitral award depends on whether it is a domestic or an international commercial arbitration award.

For international commercial arbitral awards, the grounds available to challenge, set aside or refuse enforcement are consistent, if not identical, with the grounds provided in the 1985 UNCITRAL Model Law (as well as the New York Convention):

- a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the Philippines; or
- the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case; or

[21] *Cobrain Holdings Sdn Bhd v GDP Special Projects Sdn Bhd [2010] 1 LNS 1834*
[22] *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor [2008] 3 MLJ 872*
[23] Section 16 of the AA.
[24] Section 33 of the AA.

- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only the part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement unless such agreement was in conflict with a provision of ADR Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with ADR Act; or
- the subject-matter of the dispute is not arbitrable under Philippine law; or
- the award is in conflict with the public policy of the Philippines.

For domestic awards, however, the grounds to challenge and vacate (not just correct) are as follows: (i) the award was procured by corruption, fraud or other undue means; (ii) there was evident partiality or corruption in the arbitral tribunal or any of its members; (iii) the arbitral tribunal was guilty of misconduct or any form of misbehaviour that has materially prejudiced the rights of any party; (iv) one or more of the arbitrators was disqualified to act as such and wilfully refrained from disclosing such disqualification; or (v) the arbitral tribunal exceeded its powers, or so imperfectly executed them, such that a complete, final and definite award upon the subject matter submitted to it was not made.

For both domestic or international commercial arbitral awards, courts are mandated by the ADR Act and the SC ADR Rules to disregard any other ground raised to question, challenge, vacate or set aside the arbitral award. And, more importantly, in line with the pro-arbitration state and judicial policy, courts are not allowed to review the merits of the award rendered by an arbitral tribunal.

VS: The grounds for challenging an award are as follows: (1) the incapacity of a party to the arbitration agreement; (2) the invalidity of the arbitration agreement; (3) lack of proper notice of the proceedings or other inability of a party to present its case; (4) the award deals with a dispute which is not within the scope of the arbitration agreement; (5) a flaw in the composition of the tribunal;[25] or (6) where the dispute in question was not capable of settlement by arbitration or violated public policy.[26] The court is therefore not entitled to revisit or reconsider the substantive merits of the case.

Thai courts are increasingly willing to enforce awards in disputes between private parties. However, it is not uncommon for the losing party to challenge an award then appeal any rejection of the challenge rejection. Such appeal goes directly to the Supreme Court or the Supreme Administrative Court, bypassing the Court of Appeal. This can result in a substantial delay as Supreme Court decisions can take 3-5 years. The public policy ground for annulment, particularly in cases involving State entities, can receive broad and vague interpretations. This results in a number of high-profile cases involving the State being annulled such as *Bangna Expressway Plc v ETA*,[27] and the *ITV enforcement* case. [28]

DN: The LCA prescribes five (5) grounds for setting aside arbitral awards, which resemble the grounds under the UNCITRAL Model Law, save for the following:

- The evidence supplied by the parties on which the Arbitral Tribunal relied to issue the award is forged; or an arbitrator receives money, assets or some other material benefits from one of the parties in dispute which affects the objectivity and impartiality of the arbitral award; and
- The arbitral award is contrary to the fundamental principles of the law of Vietnam.

In practice, it could be said that the number of arbitral awards being set aside by Vietnamese courts is still high. From 2011 to 2014, around 50% of the challenges to VIAC arbitral awards were granted.[29] From 2015 through 2017, the situation seemed to be better with only 3 VIAC awards being set aside.[30] Nevertheless, the number of awards being set aside has recently been increasing. In 2019, based on the public data of the Supreme People's Court, 5 out of 17 (or 29%) applications for annulment of arbitral awards were accepted by Vietnamese courts.[31] One of the most common grounds that the Vietnamese courts often rely on to review the arbitral award and/or grant the challenge to arbitral awards was *"the violation of the fundamental principle of Vietnamese laws"*.

8. The jurisdiction of an arbitral tribunal is often denied by a party to an arbitration proceeding. Does your jurisdiction recognise the principle of kompetenz-kompetenz

CA: The doctrine of *kompetenz-kompetenz* applies in Malaysia pursuant to Section 18(1) of the Act, which corresponds with Article 16 of the Model Law. There are two crucial aspects to the doctrine, namely, the tribunal can rule on its own jurisdiction without the need for support from the court, and the courts need not determine the issue before the tribunal has had a chance to consider it.

The jurisdiction of the tribunal includes any objections to the existence or validity of the arbitration agreement. Two types of pleas can be made to the tribunal pursuant to Section 18 of the Act, namely, the tribunal does not have jurisdiction, and it is exceeding its authority. An appeal must be lodged within 30 days to the High Court; hence the tribunal's decision on the issue of jurisdiction is not final.

In *TNB Fuel Services Sdn Bhd v China National Coal Group*,[32] the Court held that a tribunal could hear and determine a jurisdictional challenge, which is consistent with the general attitude of the courts to lean in favour of arbitration.

While an appeal is pending, the tribunal can continue the arbitral proceedings and make an award.[33] The courts are unlikely to order a stay of the arbitral proceedings unless the tribunal has no jurisdiction.

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[25] *Section 40(1) of the AA.*
[26] *Section 40(2) of the AA.*
[27] *Supreme Court Decision No 7277/2549 (2006).*
[28] *Supreme Administrative Court Case No 349/2549 (2006).*
[29] *http://www.viac.vn/tin-tuc-su-kien/to-tung-trong-tai-toa-an-phai-ho-tro-dac-luc-n378.html, accessed on 22 July 2020.*
[30] *http://www.viac.vn/thong-ke, accessed on 22 July 2020.*
[31] *Nguyen Ngoc Minh, Nguyen Thi Thu Trang and Nguyen Thi Mai Anh, Enforceability of arbitral awards in Vietnam- alarming practice, The Asia- Pacific Arbitration Review 2021, Law Business Research, p. 103.*
[32] *[2013] 4 MLJ 857*
[33] *Section 18(9) of the Act.*

PP: The principle of *kompetenz-kompetenz* is expressly recognised by the various ADR laws, the SC ADR Rules, and settled jurisprudence.

VS: Thailand recognises the principle of kompetenz-kompetenz.[34] Specifically, the arbitral tribunal has the authority to decide upon its own jurisdiction, the existence and validity of the arbitration agreement, the validity of the appointment of the tribunal, and issues of dispute falling within the scope of its jurisdiction. Jurisdictional challenges must be raised no later than the filing of the statement of defence except where a party challenges an arbitrator or alleges that the tribunal is exceeding the scope of its authority.[35]

DN: Yes, the principle of kompetenz-kompetenz is recognised in Art. 43 of the LCA. Accordingly, prior to dealing with the merits of a dispute, the Tribunal is required to rule on its own jurisdiction. The Resolution 01 of the Supreme People's Court further provides that where a Statement of Claim has been filed, and the Arbitral Tribunal has been dealing with the dispute, even though the Court realises that the dispute is not subject to the jurisdiction of the Tribunal, there is no arbitration agreement, or the arbitration agreement is incapable of being performed, and one party requests the Court to resolve the dispute, the Court shall return the petition to the petitioner. Where the Court has enrolled the case, the Court shall decide to suspend the case. However, the local courts, at a request of a party, shall have the power to review such Tribunal's decision on jurisdiction. The decision of Court shall be final and binding on the parties and the Tribunal.

9. Are the courts and arbitral tribunals entitled to award interim relief in your jurisdiction? If, so what types of relief are available to each?

CA: The powers of the court to order interim measures are set out in Section 11 of the Act which was amended in 2018. A party may either before or during arbitral proceedings, apply to the High Court for the following orders:

(a) Maintain or restore the status quo pending the determination of the dispute;
(b) Take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process;
(c) Provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of an arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;
(d) Preserve evidence that may be relevant and material to the resolution of the dispute; or
(e) Provide security for the costs of the dispute.

Section 19 of the Act provides that unless agreed otherwise by the parties to the arbitration, a tribunal can grant interim measures analogous to those of the High Court.

Interim measures should be applied to the tribunal before an application is made to the High Court. A party may, when an application for interim measures is refused by the tribunal, make a further application pursuant to Section 11 to the High Court.

PP: The ADR Act expressly allows arbitral tribunals and, under certain circumstances, courts to issue interim measures of protection that are intended to: (i) prevent irreparable loss or injury; (ii) provide security for the performance of an obligation; (iii) produce or preserve evidence; or (iv) compel any other appropriate act or omission. Note: courts may issue such interim relief only under limited circumstances such as prior to the commencement of arbitration, prior to the constitution of the tribunal, or whenever a tribunal has no power to act, or is unable to act, effectively.

Among the possible interim measures of protection that a court may grant include preliminary injunction directed against a party to arbitration; preliminary attachment against property or garnishment of funds in the custody of a bank or a third person; appointment of a receiver; or detention, preservation or delivery of property.

VS: Under Thai law, arbitrators are not empowered to order interim measures or other forms of provisional relief. A party may, therefore, seek provisional measures from the competent court either before or during the arbitration proceedings.[36] Courts are empowered to pass orders for deposit of money as a security, seizure of property or funds, temporary injunctions to restrain a party from continuing or repeating any act, and orders directing public officials to register, modify or cancel registrations relating to property. Parties may even make emergency applications for provisional measures if they are able to prove the existence of an emergency. However, the new 2017 TAI Arbitration Rules have provided for the tribunals to order interim relief.[37] The enforcement of a tribunal's interim order may require the court's assistance where compliance is not voluntary.

DN: Under Article 49.2 of the LCA, the Arbitral Tribunal or the Court can grant one or more of the following interim reliefs:

(i) Prohibition of any change in the status quo of the assets in dispute;
(ii) Prohibition of acts that are adverse to the arbitration proceedings or ordering one or more specific actions to be taken by a party in dispute in order to prevent those acts;
(iii) Attachment of the assets in dispute;
(iv) The requirement of preservation, storage, sale, or disposal of any of the assets of one or all parties in dispute;
(v) A requirement of interim payment of money as between the parties; and
(vi) Prohibition of transfer of property rights of the assets in dispute.

Besides the interim reliefs listed above, the local Court has exclusive power to grant other interim reliefs under Art. 114 of the Civil Procedure Code, including inter alia:

(i) Freezing of accounts at banks, other financial institutions, or state treasuries;
(ii) Freezing of assets at places of deposit; and
(iii) Freezing of obligor's assets.

[34] Section 24 of the AA.
[35] *Idem*.
[36] Section 16 of the AA.
[37] Article 29 of the TAI Arbitration Rules 2017.

Notably, a party cannot request the Arbitral Tribunal and the local Court concurrently to order the same interim relief in an arbitration proceeding.

10. Your jurisdiction is a party to Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). Do the grounds for refusing enforcement of an arbitral award in your jurisdiction differ from those specified in the New York Convention? Is there any limitation period applicable to enforce a foreign arbitral award in your jurisdiction?

CA: Sections 38 and 39 deal with recognition and enforcement of foreign arbitral awards and the grounds for refusing same. These sections apply both to awards sought to be enforced in Malaysia in respect of domestic and foreign awards. These provisions mirror Articles 35 and 36 of the Model Law and the provisions of the New York Convention.

Section 38 sets out the procedure to enforce a foreign award[38] and allows for awards made in an international arbitration with a seat in Malaysia to be enforceable.

Section 39 deals with grounds for refusing recognition or enforcement, which grounds are exhaustive. The courts adopt a narrow interpretation of 'public policy' in setting aside applications and the same applies in respect of Section 39 of the Act.[39]

There is no decision in Malaysia which directly addresses the notion of a passive remedy in the event a party does not raise a plea of no jurisdiction.

Section 38 is a 'recognition procedure' to convert an arbitration award to a judgment and can only be done by the person holding an arbitration award, and it is impermissible to argue the merits. The arguments relating to merits are only permitted pursuant to Section 39.

International arbitral awards rendered outside the Malaysian jurisdiction are enforceable if they are issued from states which are parties to the New York Convention.

PP: The grounds to refuse recognition and/or enforcement of a foreign arbitral award under the ADR Act are consistent, if not identical, with the grounds provided in the New York Convention. At the moment, there is no specific period under the ADR Act within which petitions to enforce foreign arbitral awards should be filed in the Philippines.

VS: Thai courts are entitled to refuse enforcement on the grounds specified in the New York Convention,[40] as well as if it considers that enforcement would contravene public policy and good morals of the people.[41] In practice, Thai courts tend to apply these grounds fairly. However, the public policy ground can occasionally be broadly interpreted, particularly in cases involving State entities.

The Thai Arbitration Act requires a party seeking an enforcement to file an application with the competent court within a period of three years from the date on which the award is issued.

DN: The recognition of foreign arbitral awards is regulated by Part Seven of the CPC. To be considered for recognition and enforcement by Vietnamese courts, the arbitral award must "*settle the entire dispute, terminate the arbitral proceedings and be effective*".[42] Therefore, interim awards cannot be recognised and enforced in Vietnam. Besides, as mentioned above, regardless the seat of arbitration, arbitral awards issued by a foreign arbitral institution shall be considered as foreign arbitral awards, meaning that such award must be recognised by Vietnamese courts to be enforced in Vietnam.

The grounds to refuse recognition of foreign arbitral awards in the CPC are provided in Article 459 of the CPC, which resemble the grounds under the New York Convention and the UNCITRAL Model Law, except for the replacement of the public policy concept with the fundamental principles of Vietnamese law.

The time limit for a party to submit an application for the recognition and enforcement of foreign awards in Vietnam is three (3) years as from the date the arbitral award became legally effective.

11. What are the current trends or issues affecting the use of arbitration in your jurisdiction? Would you describe your jurisdiction as pro-arbitration in nature? Why or why not?

CA: Arbitration is popular in Malaysia. Many of the arbitrations that take place in Malaysia appear to be construction-based, although there are also a significant number of commercial arbitrations. A current topic amongst practitioners is whether there should be appeals to the High Court on a point of law as provided in the previous Section 42 of the Act which was repealed in 2018. There is a call for reinstating the said provision with a filter mechanism. It remains to be seen whether Section 42 will be revisited.

No Director of the AIAC that has been appointed since the demise of the previous Director. This has an impact on the registering of arbitrations by the AIAC as well as an impact on the appointment of arbitrators and adjudicators given the statutory provisions in place under the Act and the Construction Industry Payment and Adjudication Act 2012. Steps should be taken to appoint a Director on an urgent basis; otherwise, the AIAC as an arbitral institution is likely to be impaired.

It is hoped that given Malaysia is a pro-arbitration jurisdiction that remedial steps will be adopted soon to ensure the AIAC is able to reach its full potential as an attractive arbitral institution and Malaysia as a premier arbitration jurisdiction within Asia.

PP: The live issues that are currently subject of much debate include the binding effect of emergency arbitration decisions and/or reliefs; the extent of the coverage of the legally mandated confidentiality obligation in arbitration; the challenges arising from the CIAC's seemingly compulsory jurisdiction over construction disputes; as well as the extent of a court's power to issue interim relief even before the commencement of arbitration, and the power of an arbitral tribunal to reverse the same.

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[38] *The way such an application is to be made is set out in Order 69 rule 8(1) of the Rules of Court 2012. The application may be made on an ex parte basis. In Tune Talk Sdn Bhd v Padda Gurtaj Singh [2019] MLJU 67, the Court of Appeal held that the provisions of Sections 38 and 39 are exhaustive and that there is no room for any other substantive requirements to be satisfied for the recognition and enforcement of an arbitral award. The Court of Appeal further held that the provisions of Order 69 rule 8(1) of the Rules of Court 2012 merely set out the procedural means to obtain enforcement and recognition of the arbitral award. An act of non-compliance with the procedural requirements is therefore not fatal.*

[39] *See Kelana Erat Sdn Bhd v Niche Properties Sdn Bhd [2012] 5 MLJ 809 and the discussion under section 'H. Challenge and Other Actions against the Award' above.*

[40] Section 43 of the AA.

[41] Section 40(2) of the AA.

[42] Article 3.10 of the LCA.

As mentioned earlier, the Philippines has expressly adopted a state policy that is pro-arbitration. This state policy has been mirrored in various SC decisions as well as expressly prescribed in the SC ADR Rules. Indeed, this pro-arbitration policy (if not, pro-arbitration bias) is illustrated by the clear mandate of the courts to refer the parties to arbitration whenever an arbitration agreement is alleged to exist, and the pre-eminence of the arbitral tribunal's decisions vis-à-vis interim measures earlier granted by the courts. More importantly, the SC's consistent reminder in its decisions that courts are not permitted to review the merits of an arbitral award is reflective of the Philippines' pro-arbitration nature.

VS: Thailand is increasingly adopting a pro-arbitration attitude. The amendment to the Thai Arbitration Act to provide work permits is a positive change in the right direction. However, there are still some additional processes, such as the requirement of a pre-entry visa and a health certificate, that should be abolished. The THAC and TAI are both conducting training with the government and judiciary to improve their knowledge of arbitration. The timeline for enforcement of awards is also generally now shorter, approximately one year. From experience, the courts have readily enforced awards in cases involving private parties. In addition, the Supreme Administrative most recently reinstated a *Hopewell Holdings Company* award in a case involving the State entity.[43]

The lifting of a total ban of arbitration clauses in State contracts in 2015 is another significant development in Thailand.

DN: Firstly, in 2016, Vietnam adopted the Decree on Commercial Mediation No. 22/2017/ND-CP. The mediated settlement agreement could be recognised by the Vietnamese court and on that basis, shall be enforced as a court judgment in Vietnam.[44] Accordingly, it is expected that the multi-tiered dispute resolution with 'Med-Arb' and 'Arb-Med-Arb' regimes will be more and more favoured by foreign investors, as well as their local partners.

Secondly, Vietnam currently has 31 arbitration centres.[45] In December 2019, the Korean Commercial Arbitration Board was also permitted to establish an overseas office in Vietnam. The rising number of arbitral institutions in Vietnam demands that all these institutions provide the highest quality services and procedural rules to compete with each other. Also, the judicial support of the courts towards foreign arbitration seated in Vietnam has received more attention.

Thirdly, to mitigate the adverse consequences of COVID-19 pandemic, or any other pandemic may occur in the future, virtual hearings and e-documents will be more popular in Vietnam. However, it may take more time for Vietnam to study and implement virtual hearings/meetings in accordance with international standards.

Lastly, to date, Vietnam has become a party of 67 Bilateral Investment Treaties ("BITs")[46], 13 Free Trade Agreements ("FTAs"), and is in the negotiation process for three others.[47] The investor-state dispute settlement clauses under these BITs and FTAs certainly affect how the Vietnamese Government handles investment claims, as well as improve investment arbitration in Vietnam.

As stated above, the LCA has adopted fundamental principles under the UNCITRAL Model Law; the grounds to refuse the recognition and enforcement of foreign arbitral awards in the CPC basically resemble the grounds under the New York Convention. To be specific, the Claimant shall have the right to select the arbitration forum and the arbitration institution to resolve the dispute, in case parties agreed to settle their dispute by arbitration but failed to clarify the arbitration forum or a particular arbitration institution. Additionally, the Court must refuse to enrol or dismiss the case if the dispute is subject to an existing arbitration agreement.[48] Therefore, it could be said that the domestic arbitration legal regime of Vietnam adopts an arbitration-friendly approach.

However, Vietnam has not been described as a pro-arbitration jurisdiction due to some gaps between Vietnamese law, the UNCITRAL Model Law, and the New York Convention, as mentioned above. In addition, Vietnam is regarded as a jurisdiction where it is difficult to enforce foreign arbitral awards.[49] In fact, from 2015 to 2019, around 21% of the applications for recognition and enforcement were rejected by Vietnamese courts. The said situation, nevertheless, is expected to improve due to the Vietnamese government's policy to encourage the use of arbitration and ADR, as well as the upcoming legal reforms in Vietnam.

12. In your opinion, is there a shift from Western jurisdictions to Eastern jurisdictions with regards to the preferred seat of arbitration? If so, how should ASEAN countries capitalise on this opportunity?

CA: I do not see a truly major shift from Western jurisdictions to Eastern jurisdictions. There is no doubt that there has been in recent times a considerable number of arbitrations in Singapore, Hong Kong and to a limited extent, in Malaysia but it cannot be denied that most of the major commercial arbitration disputes and investment treaty claims are seated in Europe and North America. In so far as ASEAN countries are concerned, the only way in which they can take steps to attract arbitrations to this part of the world is for (i) the incorporation of appropriate local legislation to support arbitration as an alternative to domestic litigation before the national courts, (ii) national courts through their decisions to establish jurisprudence that is arbitration-friendly, (iii) there to be clear support from the business community for arbitration and (iv) ultimately, financial and political backing from the relevant Governments within the region in support of arbitration as an alternative or preferred dispute resolution mechanism.

Not all countries within Asia, and for that matter ASEAN, are strictly Model Law countries. It may be opportune to ensure harmony in the conduct of arbitration disputes and the enforcement of arbitral awards across the region that the Model Law is consistently adopted. The economic benefits of such an approach would be beneficial to the ASEAN countries as a whole, in so far as commercial arbitrations are concerned.

PP: In my experience, I see that contracting parties, especially those based in the ASEAN region, are now more and more willing to select seats in so-called Eastern jurisdictions with experienced arbitral institutions – such as China, Hong Kong and Singapore – where, in the past, Western jurisdictions were the predominant preference. Whether this is due to the perceived strength of the arbitration law of the seat, proximity in geography, assumed neutrality or expected cost savings, this appears to be a growing

[43] Supreme Administrative Court Case No 410-412/2557 (2019).
[44] Art. 419 CPC.
[45] The information of 31 arbitration institution can be found at the Web Portal of Ministry of Justice at <https://bttp.moj.gov.vn/qt/Pages/trong-tai-tm.aspx?Keyword=&Field=&&Page=4>, accessed on 22 July 2020.
[46] https://investmentpolicy.unctad.org/international-investment-agreements/countries/229/viet-nam, accessed on 22 July 2020.
[47] http://www.trungtamwto.vn/thong-ke/12065-tong-hop-cac-fta-cua-viet-nam-tinh-den-thang-112018, accessed on 22 July 2020.
[48] Art. 2(2) Resolution 01.
[49] Anselmo Reyes, Weixia Gu, *The developing World of Arbitration: A comparative Study of Arbitration Reform in the Asia Pacific*, Bloomsbury Publishing, 2018.

trend. The ASEAN countries, especially those whose arbitration laws are not yet fully developed, should consider revamping their laws to be competitive. In addition, jurisdictions that have arbitral institutions that are not as known outside their borders must double their efforts to ensure they become familiar to users in the region and further ensure that their rules are consistent with global best practices. As a region, it may be ideal for the ASEAN countries to consider entering into regional or multilateral conventions that would facilitate enforcement of awards across jurisdictions by, at least, simplifying or harmonising the procedural requirements therefor especially those that pertain to authentication and/or certification of arbitral awards and arbitration agreements.

VS: There is certainly a shift to Eastern jurisdictions, and it is largely due to the increase in cross-border trade between Western and Eastern countries. The movement to Eastern jurisdictions, such as Hong Kong and Singapore, can be attributed to the competitiveness of certain seats in terms of quality of services and competitiveness of fee structures, as well as state-of-the-art hearing facilities. ASEAN countries can and should capitalise on the opportunity that may flow from this by continuing to improve the quality of services of their institutions and hearing facilities. This may be done by employing diverse case counsel, particularly to handle large scale complex disputes where the governing law chosen by the parties is not one that is often selected. Increased business development in Western countries would be helpful, as well as a demonstration of capacity for handling disputes under Western laws. Any obstacles to foreign arbitrators in terms of immigration, work permits, VAT and tax would also be a factor. A factor that may impede certain Asian seats from becoming arbitration friendly is the rampant use of guerrilla tactics to disrupt and delay arbitral proceedings. To the extent institutions can enact measures to deter such tactics, such as through cost sanctions and imposition of good faith, this could improve the landscape. The support of the judiciary in being pro-arbitration is also key. Considerations should be made to ensure that there are streamlined processes for the enforcement of awards and any appeals with reduced time.

DN: We do believe that Eastern countries could potentially compete with Western countries to become a preferred seat of arbitration due to the increase in Asia-related disputes arising out of cross-border transactions, and the rise of the preferred seat in Asia which could satisfy the high-quality international standards, such as Singapore and Hong Kong. In addition, recently, the Belt & Road Initiative also encouraged a shift from Western jurisdictions to Eastern jurisdictions.

To capitalise the opportunity of the shift with regards to the preferred seat of arbitration, Vietnam, as well as other ASEAN countries, should improve its shortcomings in the field of arbitration to create an attractive arbitration destination for commercial investors, including, inter alia, (i) the adoption of UNCITRAL Model law; (ii) the development of arbitration legal framework; (iii) the reputation and quality of arbitral institutions and arbitrators; (iv) judicial support for arbitration in the jurisdiction; (v) the level of foreign direct investment and free trade; and (vi) reducing the level of corruption. Also, the ASEAN governments may, as Singapore has done, have financial policies or funds to support the arbitration and ADR activities.

In fact, the Vietnamese Government has reviewed the LCA and is considering the possibility of adopting the UNCITRAL Model Law in Vietnam. Besides, many arbitration institutions in Vietnam have revised and re-structured their respective institutional rules, such that those rules have become more foreign-friendly. It is expected that this will bring more opportunities and develop the arbitration market in Vietnam.

13. How open is your jurisdiction to foreign young dispute resolution professionals?

CA: Malaysia has encouraged young dispute resolution professionals in that there are several organisations which cater to the needs of the under-40 age bracket of practitioners. For instance, there is the Malaysian chapter of the Chartered Institute of Arbitrators ("CIArb"), the Malaysian Institute of Arbitrators ("MIArb") and also the Asian International Arbitration Centre ("AIAC"), which have dedicated forums for younger practitioners to express themselves.

It is hoped that these forums, if properly managed and run, will help develop depth in expertise in Malaysia in so far as arbitration counsel and arbitrators are concerned, which at present is somewhat lacking.

PP: The Philippines has seen the rise of young individuals keen on becoming ADR providers whether as arbitrators or mediators or, at least, interested in acting as party representatives in arbitration. These individuals are welcomed as members of various ADR institutions and even encouraged to get themselves accredited, regardless of age, gender or nationality.

Youth, however, is often accompanied by certain impressions, erroneous though they may be. So, in my view, young dispute resolution professionals, foreign or Filipino, may be at a disadvantage, especially at the start when their reputations are not yet fully established in this jurisdiction. Though experience and expertise are preferred by most users in the Philippines, contracting parties and their counsel are always conscious of possible arbitrators with a good reputation as to substantive knowledge and integrity. Thus, what is important is that young ADR professionals do not compromise on their integrity, impartiality and independence and keep themselves abreast of best practices in the ADR landscape.

VS: It is common for international law firms to employ young professionals in Thailand, but there are limits by law on the ratio of foreigners that can be employed in a company.

DN: The Vietnamese Government does encourage the participation of foreign young dispute resolution professionals in Vietnam. As mentioned above, there is no restriction to the participation of foreign lawyers or arbitrators in arbitral proceedings. In fact, many foreign lawyers are practising at Vietnamese law firms, and many VIAC arbitration cases have seen the participation of young foreign lawyers.

Recently, a number of workshops and conferences were held to encourage cooperation between the Vietnamese and the foreign young dispute resolution professionals. Last year, the Young ICCA had organised the first event in Vietnam on Witnesses and Experts in International Arbitration. Such activities are expected to connect the young Vietnamese practitioners with young foreign practitioners. Further, Young Vietnam ADR Group, under the auspices of VIAC, was established recently and is aimed at creating a growing community where young dispute resolution practitioners in Vietnam can share their knowledge and working experiences.