

A BILL

i n t i t u l e d

An Act to amend the Arbitration Act 2005.

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ENACTED by the Parliament of Malaysia as follows:

Short title and commencement

1. (1) This Act may be cited as the Arbitration (Amendment) (No. 2) Act 2018.

(2) This Act comes into operation on a date to be appointed by the Minister by notification in the *Gazette*.

Amendment of section 2

2. The Arbitration Act 2005 [*Act 646*], which is referred to as the “principal Act” in this Act, is amended in section 2 in the definition of “arbitral tribunal”, by inserting after the word “means” the words “an emergency arbitrator,”.

New section 3A

3. The principal Act is amended by inserting after section 3 the following section:

“Representation

3A. Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by any representative appointed by the party.”.

Amendment of section 4

4. Subsection 4(1) of the principal Act is amended by inserting after the words “public policy” the words “or the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia”.

Amendment of section 9

5. Section 9 of the principal Act is amended—

(a) by substituting for subsection (4) the following subsection:

“(4) An arbitration agreement is in writing—

(a) if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means; or

(b) if it is contained in an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.”;

(b) by inserting after subsection (4) the following subsection:

“(4A) The requirement that an arbitration agreement be in writing is met by any electronic communication

that the parties make by means of data message if the information contained therein is accessible so as to be useable for subsequent reference.”; and

(c) by inserting after subsection (5) the following subsection:

“(6) For the purpose of this section, “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.”.

Amendment of section 11

6. Subsection 11(1) of the principal Act is amended—

(a) by substituting for the words “for:” the words “for the party to—”; and

(b) by substituting for paragraphs (a) to (h) the following paragraphs:

“(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 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.”.

Amendment of section 19

7. Section 19 of the principal Act is amended—

(a) in subsection (1)—

(i) by substituting for the words “a party may apply to the arbitral tribunal for any of the following orders.” the words “the arbitral tribunal may, at the request of a party, grant interim measures.”; and

(ii) by deleting paragraphs (a) to (d);

(b) by substituting for subsection (2) the following subsection:

“(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to—

(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 itself;

(c) provide a means of preserving assets out of which a subsequent award may be satisfied;

(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.”;

and

(c) by deleting subsection (3).

New sections 19A, 19B, 19C, 19D, 19E, 19F, 19G, 19H, 19I and 19J

8. The principal Act is amended by inserting after section 19 the following sections:

“Conditions for granting interim measures

19A. (1) The party requesting for the interim measures order under paragraphs 19(2)(a), (b) or (c) shall satisfy the arbitral tribunal that—

- (a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
- (b) there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

(2) The determination on the reasonable possibility referred to in paragraph (1)(b) shall not affect the discretion of the arbitral tribunal in making any subsequent determination relating to the dispute.

(3) In respect of the request for an interim measure order under paragraph 19(2)(d), the conditions in subsections (1) and (2) shall apply only to the extent the arbitral tribunal considers appropriate.

Application for preliminary orders and conditions for granting preliminary orders

19B. (1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided that the arbitral tribunal considers that prior disclosure of the request for the interim measure to the party against whom the measure is directed risks frustrating the purpose of the interim measure.

(3) The conditions specified in section 19A shall apply to any preliminary order provided that the harm to be assessed under paragraph 19A(1)(a) is the harm that is likely to result from the order being granted or not.

Specific regime for preliminary orders

19c. (1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall—

- (a) give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto; and
- (b) give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(2) The arbitral tribunal shall decide immediately on any objection to the preliminary order.

(3) A preliminary order shall expire after twenty days from the date on which the order was issued by the arbitral tribunal.

(4) Notwithstanding subsection (3), the arbitral tribunal may issue an interim measure which adopts or modifies the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present his case.

(5) A preliminary order shall be binding on the parties but shall not be subject to any enforcement by the High Court.

(6) The preliminary order referred to in subsection (5) shall not constitute an award.

Modification, suspension or termination

19D. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon an application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Provision of security

19E. (1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Disclosure

19F. (1) The arbitral tribunal may require any party to immediately disclose any material change in the circumstances on the basis of which the interim measure or preliminary order was requested or applied or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all the circumstances that are likely to be relevant to the arbitral tribunal's determination on whether to grant or maintain the order and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case.

Costs and damages

19G. (1) The party requesting for an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the interim measure or the preliminary order to any party if the arbitral tribunal later determines that, in the circumstances, the interim measure or the preliminary order should not have been granted.

(2) The arbitral tribunal may award such costs and damages referred to in subsection (1) at any point during the proceedings.

Recognition and enforcement

19H. (1) Subject to the provisions of section 19I, an interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall immediately inform the court of any termination, suspension or modification of that interim measure.

(3) The court where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Grounds for refusing recognition or enforcement

19I. (1) Recognition or enforcement of an interim measure may be refused only—

(a) at the request of the party against whom it is invoked if the High Court is satisfied that—

(i) such refusal is warranted on the grounds set forth in subparagraph 39(1)(a)(i), (ii), (iii), (iv), (v) or (vi);

(ii) the arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

- (iii) the interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) if the High Court finds that—

- (i) the interim measure is incompatible with the powers conferred upon the Court, but the Court may decide to reformulate the interim measure to the extent necessary, without modifying its substance, to adapt it to the Court's powers and procedures for the purposes of enforcing that interim measure; or
- (ii) any grounds set forth in subparagraph 39(1)(b)(i) or (ii) apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the High Court on any of the grounds in subsection (1) shall be effective only for the purposes of the application to recognize or enforce the interim measure.

(3) The High Court where recognition or enforcement is sought shall not, in making any determination on any of the grounds in subsection (1), undertake a review of the substance of the interim measure.

Court-ordered interim measures

19J. (1) The High Court has the power to issue an interim measure in relation to arbitration proceedings, irrespective of whether the seat of arbitration is in Malaysia.

(2) The High Court shall exercise the power referred to in subsection (1) in accordance with its own procedures in consideration of the specific features of international arbitration.

(3) Where a party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the application, the High Court shall treat any findings of fact made in the course of such ruling by the arbitral tribunal as conclusive for the purposes of the application.”.

Amendment of section 30

9. Section 30 of the principal Act is amended—

(a) by substituting for subsection (1) the following subsection:

“(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.”;

(b) by deleting subsection (2);

(c) in subsection (3), by substituting for the words “Any designation by the parties of the law” the words “Any designation of the law or legal system”;

(d) by substituting for subsection (4) the following subsection:

“(4) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”;
and

(e) by inserting after subsection (4) the following subsection:

“(4A) The arbitral tribunal shall decide according to equity and conscience only if the parties have expressly authorized it to do so.”.

Amendment of section 33

10. Section 33 of the principal Act is amended—

(a) by substituting for subsection (6) the following subsection:

“(6) Subject to subsection (8), unless otherwise agreed by the parties, the arbitral tribunal may, in the arbitral proceedings before it, award simple or compound interest from such date, at such rate and with such rest as the arbitral tribunal considers appropriate, for any period ending not later than the date of payment of the whole or any part of—

(a) any sum which is awarded by the arbitral tribunal in the arbitral proceedings;

(b) any sum which is in issue in the arbitral proceedings but is paid before the date of the award; or

(c) costs awarded or ordered by the arbitral tribunal in the arbitral proceedings.”; and

(b) by inserting after subsection (6) the following subsections:

“(7) Nothing in subsection (6) shall affect any other power of an arbitral tribunal to award interest.

(8) Where an award directs a sum to be paid, that sum shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.”.

New sections 41A and 41B

11. The principal Act is amended by inserting after section 41 the following sections:

“Disclosure of information relating to arbitral proceedings and awards prohibited

41A. (1) Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to—

(a) the arbitral proceedings under the arbitration agreement; or

(b) an award made in those arbitral proceedings.

(2) Nothing in subsection (1) shall prevent the publication, disclosure or communication of information referred to in that subsection by a party—

(a) if the publication, disclosure or communication is made—

(i) to protect or pursue a legal right or interest of the party; or

(ii) to enforce or challenge the award referred to in that subsection,

in legal proceedings before a court or other judicial authority in or outside Malaysia;

(b) if the publication, disclosure or communication is made to any government body, regulatory body, court or tribunal and the party is obliged by law to make the publication, disclosure or communication; or

(c) if the publication, disclosure or communication is made to a professional or any other adviser of any of the parties.

Proceedings to be heard otherwise than in open court

41B. (1) Subject to subsection (2), court proceedings under this Act are to be heard otherwise than in an open court.

(2) Notwithstanding subsection (1), the court may order the proceedings to be heard in an open court—

(a) on the application of any party; or

(b) if, in any particular case, the court is satisfied that those proceedings ought to be heard in an open court.

(3) An order of the court under subsection (2) is final.”.

Deletion of section 42

12. The principal Act is amended by deleting section 42.

Deletion of section 43

13. The principal Act is amended by deleting section 43.

EXPLANATORY STATEMENT

This Bill seeks to amend the Arbitration Act 2005 (“Act 646”) to enhance Malaysia’s profile on international and regional arena as a safe-seat and arbitration friendly jurisdiction. The proposed amendments are a reflection of the 2006 amendments to the United Nations Commission on International Trade Law Model on International Commercial Arbitration (“UNCITRAL Model Law”).

2. *Clause 1* contains the short title of the proposed Act and the power of the Minister to appoint the commencement date of the proposed Act.

3. *Clause 2* seeks to amend section 2 of Act 646 in the definition of “arbitral tribunal” to remove ambiguity and to ensure clarity in relation to the awards issued by an emergency arbitrator.

4. *Clause 3* seeks to introduce a new section 3A into Act 646 to ensure that both domestic and international parties have the freedom to choose representation by any representative.
5. *Clause 4* seeks to amend section 4 of Act 646 by inserting the provision on the relevancy of arbitrability of a subject matter when deciding on the question of arbitrability of a dispute.
6. *Clause 5* seeks to amend section 9 of Act 646 to provide for a framework for the recognition of arbitration agreements made in electronic form.
7. *Clause 6* seeks to amend section 11 of Act 646 to provide for the jurisdiction of the High Court to grant interim measures.
8. *Clause 7* seeks to amend section 19 of Act 646 to provide for the power of the arbitral tribunal to grant interim measures similar to the measures granted by the High Court.
9. *Clause 8* seeks to introduce new sections 19A, 19B, 19C, 19D, 19E, 19F, 19G, 19H, 19I and 19J into Act 646.

The proposed new section 19A seeks to provide for the conditions for granting interim measures.

The proposed new section 19B seeks to provide for the application for preliminary orders and the conditions for the granting of preliminary orders. Preliminary orders provide a way for preserving the status quo until the arbitral tribunal issues an interim measure.

The proposed new section 19C seeks to provide for specific mechanism that governs the granting of preliminary orders which sets out the safeguards for the party against whom the preliminary order is directed.

The proposed new section 19D seeks to provide that the arbitral tribunal is empowered to modify, suspend or terminate an interim measure.

The proposed new section 19E seeks to provide that the arbitral tribunal may require the party requesting an interim measure to provide security unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

The proposed new section 19F seeks to provide for the obligation on a party to disclose any material change in certain circumstances in order to ensure just and fair decision in granting the interim measures.

The proposed new section 19G seeks to provide that the liability to pay costs and damages is on the party who is requesting an interim measure or who is applying for a preliminary order if the party fails in such request or application.

The proposed new section 19H seeks to provide for the recognition and enforcement of an interim measures issued by an arbitral tribunal.

The proposed new section 19i seeks to provide for the grounds for refusing the recognition or enforcement of an interim measure.

The proposed new section 19j seeks to provide that the High Court has the power to issue interim measures in relation to arbitration proceedings.

10. *Clause 9* seeks to amend section 30 of Act 646 to provide that parties to an arbitration proceeding may choose the rule of law that is applicable to the substance of the dispute.

11. *Clause 10* seeks to amend section 33 of Act 646 to empower the arbitral tribunal to award pre-award and post-award interest.

12. *Clause 11* seeks to introduce new sections 41A and 41B into Act 646.

The proposed new sections 41A and 41B aim to protect the confidentiality of arbitration proceedings, which is one of the core elements of arbitration.

13. *Clauses 12* and *13* seek to delete sections 42 and 43 of Act 646. Section 42 is deleted to promote arbitration as an alternative form of dispute resolution. Section 43 is deleted as a consequence of the deletion of section 42.

FINANCIAL IMPLICATIONS

This Bill will not involve the Government in any extra financial expenditure.

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