

LEGAL
ALERT

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Key changes under the Arbitration (Amendment) (No.2) Act 2018

The Arbitration (Amendment) (No. 2) Bill 2018 (“the Bill”) was passed in Dewan Negara (Senate) on 5 April 2018 and came into force as the Arbitration (Amendment) (No.2) Act 2018 (“the Act”) on 8 May 2018.

The passing of the Act signals Malaysia’s effort to enhance its profile as a safe-seat and arbitration friendly jurisdiction. The amendments reflect the 2006 amendments to the United Nations Commission on International Trade Law Model on International Commercial Arbitration (“UNCITRAL Model Law”) and enhance party autonomy in resolving disputes by arbitration.

Key changes under the Act

1. **Definition of “arbitral tribunal” to include “emergency arbitrator”**

The definition of “arbitral tribunal” has been amended to include the words “emergency arbitrator” so as to remove any ambiguity and ensure clarity of awards issued by an emergency arbitrator.

2. **Freedom of parties to choose representation (s.3A)**

The introduction of this section in the Act is to allow both domestic and international parties the freedom to choose their own representatives in the arbitration proceedings.

3. **Recognition of electronic forms of arbitration agreements (s.9)**

In this day and age many agreements are conducted through electronic forms. In order to modernise the requirement of arbitration agreement to conform to international contract practice, the definition of “arbitration agreement” has been expanded to include arbitration agreement made in electronic form.

4. **High Court granted jurisdiction to grant interim measures (s.11)**

Section 11(1) has been amended to provide jurisdiction to the High Court to grant interim measures to maintain or restore the status quo of the parties pending the determination of the dispute by the arbitral tribunal, preservation of evidence and to order security for costs.

5. **Arbitral tribunal granted jurisdiction to award pre-award and post-award interest (s.33)**

Section 33 has been amended to allow for the arbitral tribunal to award pre and post award interest. Where an award directs for a sum to be paid, such sum shall carry interest from the date it has been awarded and at the same rate as a judgment debt.

6. **Confidentiality Clause (s.41A & 41B)**

Confidentiality is one of the core elements of arbitration. In order to enhance Malaysia’s status as a safe seat, the addition of an express clause on confidentiality aims to protect the confidentiality of arbitration proceedings. Section 41A prohibits the disclosure of arbitral proceeding or award, barring certain circumstances provided in the section:

- disclosure is made during any legal proceedings where it is necessary to protect or pursue a legal right or interest, or to enforce or challenge an award that has been referred;
- disclosure is made to any government body, regulatory body, court or tribunal and party is obliged by law to disclose; or
- disclosure is made to a professional or any advisor of the parties.

Court proceedings under the Arbitration Act 2005 should be conducted in private unless the court ordered for proceedings to be made in open court on the application of any party, or the court is satisfied that those proceedings ought to be heard in open court.

7. **Applications and guidelines for preliminary order and interim measures (s.19A–19J)**

Amendments have also been made to section 19, with the introduction of new sections 19A–19J, to provide the arbitral tribunal the power to grant interim measures, similar to measures granted by the High Court. The introduction of the new sections is in order to supplement the powers of the arbitral tribunal in granting interim relief. A brief summary of the sections is as follows:

- Section 19A – sets out the conditions in granting interim measures;
- Section 19B – set out the applications and conditions for granting preliminary orders. The granting of a preliminary order serves to preserve the status quo until an interim measure has been granted by the arbitral tribunal;
- Section 19C – provides for specific mechanism for the granting of the preliminary orders. A preliminary order is binding on the parties but is not subject to any enforcement by the High Court;
- Section 19D – provides for the modification, suspension and termination of interim measures either upon an application by either party or the arbitral tribunal’s initiative;
- Section 19E – where necessary or appropriate the arbitral tribunal may require the party requesting the arbitral tribunal to provide security;
- Section 19F – where there is a material change in the circumstances of the party, it is the obligation of the party to disclose the material change;
- Section 19G – provide that the liability to pay the costs and damages is on the party who requested the interim measure or preliminary order if the party failed in their application;
- Section 19H – provides for the recognition and enforcement of interim measures regardless of the country that issued the interim measure;
- Section 19I – provides for the grounds in refusing the recognition or enforcement of an interim measure;
- Section 19J – grants the High Court the power to issue interim measure relating to arbitration proceedings irrespective of the seat of arbitration.

8. **Deletion of sections 42 and 43 in order to promote arbitration as an alternative form of dispute**

The purpose of the deletion of these sections is to promote arbitration as an alternative form of dispute resolution which enhances the finality of arbitral awards. Domestic parties can no longer challenge the arbitral award to the High Court on grounds of questions of law that substantially affect their rights. In the past, parties tend to rely on section 42 as an alternative method to set aside or vary the award. With the deletion of sections 42 and 43, this option is no longer available.

If you have any questions or require any additional information, kindly contact [Sabarina Samadi](#) or the ZICO Law partner you usually deal with.

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