

Malaysia

Skrine

Litigation

1 What is the structure of the legal profession?

Malaysia has a fused legal profession, and practitioners are known as “advocates and solicitors”. There are two separate bodies of practitioners: “Advocates and Solicitors of the High Court of Malaya”, who are entitled to practise in Peninsular Malaysia; and “Advocates and Solicitors of the High Court of Sabah and Sarawak”, who are entitled to practise in the two East Malaysian states of Sabah and Sarawak.

A person is qualified for appointment as a judge of the High Court, Court of Appeal and the Federal Court if they are a Malaysian citizen and, for the 10 years preceding their appointment, have been an advocate and solicitor or a member of the judicial and legal service, or a combination of both.

Under Article 122B of the Malaysian Constitution, the appointment of judges is made by His Majesty The King on the advice of the Prime Minister after consulting the Conference of Rulers.

All judges of the Superior Courts retire at the age of 65 and shall not be removed from office except in accordance with the provisions of Article 125 of the Malaysian Constitution (ie, for breach of any provision of the code of ethics prescribed under Article 125(3A), or on grounds of inability through infirmity of body or mind or otherwise properly to discharge the functions of office).

2 What is the structure of the Court system?

There are three tiers of civil Courts: the Subordinate Courts, the High Court and the Appellate Courts. The Subordinate Courts consist of the Magistrate Court and the Sessions Court, with a civil monetary jurisdictional limit of RM25,000 and RM250,000 respectively. Claims exceeding RM250,000 are heard by the High Court. The Appellate Courts consist of the Court of Appeal and the apex Court, the Federal Court.

There are two separate Court systems of co-ordinate jurisdiction operating in Malaysia, namely the High Court of Malaya and the High Court of Sabah and Sarawak, each covering its own territorial jurisdiction. The Islamic Court system runs parallel with the civil Court system. The Islamic Court is known as the Syariah Court and its jurisdiction is limited to family disputes, estate claims and certain offences considered criminal under Islamic laws. All parties to proceedings in the Syariah Court must be of the Muslim faith.

3 What is the role of the judge (and where applicable, the jury) in civil proceedings?

The Malaysian legal system adopts the common law adversarial system and common law rules of precedent. Although judges play a relatively passive role in legal proceedings, they are vested with powers to enable them to play an active role in determining the manner in which the proceedings are to be conducted, including giving pre-trial directions as to the future conduct of the proceedings to ensure its just, expeditious and economical disposal.

There are no jury trials in Malaysia.

4 What are the time limits for bringing civil claims?

Limitation periods are governed by the Limitation Act 1953. Generally, claims founded on a contract or on tort must be brought within six years from the date on which the cause of action accrues. Actions for recovery of money secured by a charge or mortgage, for foreclosure and for recovery of land must be brought within 12 years from the date on which the cause of action accrues, whilst an action to recover any penalty or forfeiture must be brought within one year from the date on which the cause of action accrues.

The above time limits can be extended by factors such as mistake, fraud, fraudulent concealment or disability.

5 How are civil proceedings commenced, and what is the typical procedure which is then followed?

A civil claim is commenced by the plaintiff paying the Court fee and filing a formal claim in Court. This can be by way of a writ of summons, an originating summons, an originating motion or a petition. A copy of this claim must be served on the defendant.

A defendant who intends to defend the claim must file an appearance and enter their defence, failing which a default judgment may be entered. Further pleadings may then be exchanged, followed by discovery of documents and exchange of other evidence as described below. The matter will then be set down for trial.

6 What is the extent of pre-trial exchange of evidence, and how is evidence presented at trial?

Pre-trial exchange of evidence chiefly concerns the exchange of documents. The discovery process concerns relevant documents which are or have been in a party's possession, custody or power. If either party feels that the list of documents provided by the other side is incomplete, that party may apply for an order to compel discovery and the Court has wide powers in dealing with non-compliance of such an order.

It is also common for the Courts to require parties to identify the agreed facts, to frame the issues to be tried, and to file the "agreed" and "non-agreed" bundles of documents.

At the trial, the plaintiff's counsel begins by making an opening statement. This is followed by the calling of witnesses, firstly by the plaintiff and thereafter by the defendant. Each witness will be orally examined in chief by counsel for the party calling them, cross examined by the other side and re-examined by their own side's counsel. Alternatively, the examination in chief of witnesses may be reduced into a witness statement that is exchanged prior to trial, and such a witness statement can be used in Court in place of an oral examination in chief.

Where expert evidence is to be adduced, this is usually done by way of pre-trial exchange of a written report or affidavit.

7 To what extent are the parties able to control the procedure and the timetable? How quick is the process?

The Rules of Court govern the procedure. The Court generally has control of the timetable but parties have some degree of control over the schedule and timetable of the case. Where the parties have mutually agreed to extend the time schedule, it is usual for the Court to accede to the parties' request for an extension of time. If the parties are unable to mutually agree to an extension of time, the Court has the discretion to consider and decide on such request. Where there is urgency in the hearing or disposal of a matter, a party may file a certificate of urgency, giving the reasons for the early disposal of the matter.

The time frame for a matter to be disposed of in a full trial is very subjective. It depends on the Court's calendar, the complexity of the case as well as the disposal of interlocutory applications made thereto. As a very general guide, it will take at least one to two years for a case to be heard and disposed of in a full trial.

8 What interim remedies are available to preserve the parties' interests pending judgment?

The interim remedies available include:

- (i) interlocutory injunctions;
- (ii) Mareva injunctions to prevent dissipation of assets;
- (iii) order for detention, custody or preservation of property which is the subject matter of the action;
- (iv) order for samples to be taken;
- (v) order for sale of perishable property;

- (vi) appointment of a receiver;
- (vii) recovery of property subject to a lien;
- (viii) allowance of income of property pendente lite;
- (ix) interim payments;
- (x) Anton Piller order to permit an applicant to enter the premises of a respondent to search, inspect and remove evidential material;
- (xi) remedies under the Debtor's Act 1957;
- (xii) injunction to restrain a party from pursuing foreign proceedings.

9 What substantive remedies are available?

The Court can order payment of money or damages, grant permanent injunctive relief, make declaratory orders and orders for specific performance, account of profit and other remedies. Punitive and exemplary damages are rarely ordered.

10 What means of enforcement are available?

Court judgments and orders can be enforced by way of :

- (i) writ of seizure and sale (for chattels);
- (ii) prohibitory order followed by sale by public auction (for immovable property);
- (iii) writ of possession;
- (iv) writ of delivery;
- (v) garnishee order (for money in the hands of third parties);
- (vi) charging order (for shares);
- (vii) committal proceedings;
- (viii) appointment of receivers by way of equitable execution;
- (ix) bankruptcy/winding up proceedings;
- (x) judgment debtor summons.

11 Does a Court have power to order costs? Are foreign claimants required to provide security for costs?

Payment of costs is usually ordered against the losing party. The amount of costs, unless agreed, will be taxed by the Court.

Foreign claimants may be required to deposit money in Court as security for future costs liability. This requirement to provide security is not automatic, but will depend on the facts and circumstances of the case.

12 On what grounds can the parties appeal, and what restrictions apply? Is there a right of further appeal? To what extent is enforcement suspended pending an appeal?

Appeals to the next level of Court hierarchy generally lie as a matter of right for final orders. For interlocutory orders or rulings, the right of appeal is dependent on whether the decision finally disposes of the rights of the parties thereto.

The usual grounds of appeal will be error of fact or error of law, procedural irregularity and/or misdirection of law or fact. There are specific time frames for filing an appeal, and the right of appeal in some cases may be subject to leave of Court being obtained (eg, leave of the Court of Appeal must be obtained where the value of the appeal is below RM250,000; leave of the Federal Court must be obtained for all civil appeals to the Federal Court).

An appeal does not operate as an automatic stay of execution of the order that is the subject of the appeal.

13 To what extent can domestic and/or foreign state entities claim immunity from civil proceedings?

Foreign states, diplomats, and foreign sovereigns can claim immunity from civil proceedings.

Apart from this, no other entity or individual is immune to civil claims. This includes the Governments of Malaysia and the States, as well as organisations and entities linked to the Government.

14 What procedures exist for recognition and enforcement of foreign judgments?

Under the Reciprocal Enforcement of Judgment Act 1958, judgments of a superior Court in reciprocating countries can be registered in Malaysia, and upon registration, such judgments can be enforced in Malaysia.

In the case of foreign judgments which fall outside the ambit of the Reciprocal Enforcement of Judgment Act 1958, a fresh action must be brought on the judgment debt in the Malaysian Court under the common law.

15 Is it permissible for lawyers to charge contingency or conditional fees, or other fee arrangements based on the result of the litigation/arbitration?

Contingency or conditional fees and/or other fee arrangements based on the result of litigation/arbitration are prohibited by the Legal Profession Act 1976. Section 112(b) of the Legal Profession Act provides that no advocate and solicitor shall enter into any agreement by which they are retained or employed to prosecute any suit or action or other contentious proceeding which stipulates for or contemplates payment only in the event of success of such suit, action or proceeding. This section contemplates the charging of such fees in both litigation and arbitration proceedings. An advocate or solicitor who is in breach of Section 112(b) will be subject to disciplinary proceedings and if found guilty of misconduct by the Disciplinary Board may be liable to be struck off the Roll or suspended from practice for a period not exceeding five years.

Arbitration

16 Is the arbitration law based on the UNCITRAL Model Law?

The governing law for arbitration is the Arbitration Act 1952 (the Act). The Act is based on the English Arbitration Act 1950 and not the UNCITRAL Model Law.

There are two distinct arbitral regimes in Malaysian law, namely arbitrations immune from Court intervention under section 34 of the Act and arbitrations to which the rest of the Act applies. See question 23.

17 What are the main national arbitration institutions?

The main arbitration centre is the Kuala Lumpur Regional Centre for Arbitration (the Centre) (<http://www.rcakl.org.my>). Both domestic and international arbitrations are conducted at the Centre. Other professional bodies such as the Bar Council, the Institute of Engineers, the Board of Architects and the Institute of Surveyors also provide arbitration and mediation services. Arbitrations under the auspices of the ICC International Court of Arbitration are also becoming quite common.

18 Are there any restrictions on who may represent the parties to an arbitration?

There are no restrictions as to who can appear and act in an arbitration, and it is possible for parties to engage non-legally trained experts or professionals, or even foreign lawyers to represent them in an arbitration. However, parties are usually represented by solicitors, but this is not compulsory.

19 What are the formal requirements for an enforceable arbitration agreement?

The Act defines an arbitration agreement as a written agreement to submit present and future differences to arbitration, whether an arbitrator is named therein or not.

An arbitration agreement must be in writing if the arbitration proceeding is to be governed by the Act, although there is no requirement that it should be signed. It is not necessary that the arbitration agreement should be a formal agreement, or that the terms should all be contained in one document. All that is necessary is that the parties agree in writing to submit present and future differences to arbitration and such agreement may be found in an exchange of correspondence between the parties.

20 Can the Court refuse to stay litigation if there is a valid arbitration clause?

The Court has jurisdiction to refuse to stay litigation to refer the matter to arbitration. However, a stay will usually be granted if:

- (i) there are grounds to refer the matter to arbitration in accordance with the terms of the arbitration agreement;
- (ii) the party applying for the stay has not taken any other steps in the legal proceedings;
- (iii) the party applying for a stay is ready and willing to proceed with arbitration.

21 If the arbitration agreement and any relevant rules are silent, how many arbitrators will be appointed, and who is the appointing authority?

The Act provides that unless a contrary intention is expressed in the arbitration agreement, the reference shall be to a single arbitrator. There is no prescribed procedure as to how the arbitrator will be appointed. Parties will usually agree on the appointment of an arbitrator. Where the parties are unable to agree on the appointment of an arbitrator, or where the appointed arbitrator refuses to act or is incapable of acting or dies, either party may make an application to the High Court to appoint an arbitrator. In the case of an arbitration to which section 34 of the Act applies (see question 24 below), the Director of the Centre will make the appointment if the parties are unable to agree on the appointment of the arbitrator.

22 Are restrictions placed on the right to challenge the appointment of an arbitrator?

Once appointed, an arbitrator's authority to act is irrevocable except with leave of the High Court. The Act gives the High Court powers to remove an arbitrator if the arbitrator has misconducted themselves or the proceedings, and to revoke an arbitrator's authority if the arbitrator is not or may not be impartial. The Court's power in this case does not apply to an arbitration to which section 34 of the Act applies (see question 24 below).

23 Does the domestic law contain substantive requirements for the procedure to be followed?

The Act does not contain substantive requirements for the procedure to be adopted in arbitrations. Generally the procedure to be adopted for the arbitral reference is agreed between the parties and the arbitrator at the preliminary meeting. Failing agreement, the arbitrator will make the requisite decision on questions of procedure. There is no avenue for a party to make an application to Court in the event that there is unhappiness over the procedure adopted unless that party is prepared to apply to remove the arbitrator on the grounds of misconduct. Usually, the procedure adopted by the parties for arbitral proceedings simply mirrors the Court processes.

24 On what grounds can the Court intervene during an arbitration?

Sections 22, 23, 24 and 25 of the Act allow for intervention of the Court in arbitral proceedings. These respectively provide the High Court with the jurisdiction:

- (i) to deal with questions of law arising in the course of the reference and to lay down the right for a case to be stated;
- (ii) to remit matters for the reconsideration of the arbitrator or umpire;

- (iii) to set aside an award and remove an arbitrator or umpire if the arbitrator or umpire has misconducted themselves or the proceedings or where the award has been improperly procured; and
- (iv) to revoke the authority of an arbitrator or umpire and declare an arbitration agreement to cease to have effect where an allegation of fraud is raised by one party to an agreement against the other.

The Court also provides support where required during the arbitral reference. The powers of the High Court include powers to issue *subpoenae ad testificandum* or *duces tecum* to compel attendance before an arbitrator, order security for costs, discovery of documents and interrogatories, the giving of evidence by affidavit, the taking of evidence before persons other than the arbitrator in Malaysia and elsewhere, the preservation, custody and sale of the subject matter of the reference, the securing of the amount in dispute, interim injunctions, the appointment of a receiver and the investigation of any matter necessary or expedient for the purpose of obtaining full information or evidence.

By virtue of section 34 of the Act, the foregoing provisions do not apply to arbitrations proceeding under the rules of the Centre. Such arbitrations are wholly immune from all forms of Court supervision, intervention or appeal, at any stage of the arbitral process, save in relation to enforcement of the resulting awards within Malaysia.

25 Do arbitrators have powers to grant interim or conservatory relief?

Under the Act, arbitrators do not have powers to grant interim or conservatory relief. It is open to question whether parties can confer powers on the arbitrator to grant such relief *inter partes* where no third party rights are affected.

26 When and in what form must the award be delivered?

The Act does not prescribe the form of the award nor any time limit to deliver the award except where an award is remitted to an arbitrator by the High Court and where it is mandatory under section 23(2) of the Act that the arbitrator makes their award within three months of the date of the order of remission.

Under the common law, an enforceable award should include the following criteria:

- (i) The award must be cogent;
- (ii) The award must be complete in that all issues raised by the submission to arbitration must be resolved;
- (iii) The award must be final and unconditional;
- (iv) The obligations of the parties under the award must be certain and capable of performance;
- (v) If requested by the parties, the award must contain reasons; and
- (vi) The award must be signed and dated by the arbitrator.

27 On what grounds can an award be appealed to the Court?

An arbitral award can be set aside or remitted for reconsideration by the arbitrator where:

- (i) the arbitrator has misconducted themselves or the proceedings, which would include failure to observe the rules of natural justice, appearance of bias or partiality and any irregularity of action which is not consonant with the general principles of equity or good conscience;
- (ii) there is error of law apparent on the face of an award;
- (iii) the arbitrator has made a mistake and desires the award to be remitted so that they may correct it;
- (vi) material evidence, which could not with reasonable diligence have been discovered before the award was made, has since been discovered;
- (v) the arbitrator purports to deal with a matter not expressly or impliedly submitted to them;

- (vi) the arbitrator refuses to state a case under section 22 of the Act or delays their award pending application to the Court for a direction for a case stated.

As noted in question 23 above, arbitrations under the rules of the Centre are immune from any Court appeal.

28 What procedures exist for enforcement of foreign and domestic awards?

Domestic arbitral awards are enforced by one party making an application to the High Court for leave to enforce the award. Where leave is given, judgment may be entered in terms of the award and all modes of enforcement available for the enforcement of a judgment of the High Court will be available to the party enforcing the award.

Foreign arbitral awards may be enforced by way of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) which has been legislated locally with the enactment of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985. Enforcement of foreign arbitral awards made in countries which are not signatories to the New York Convention would be by way of filing an action for breach of the terms of the award in the Malaysian Courts.

29 Can a successful party recover its costs?

The Act empowers the arbitrator to make an award of costs. The successful party will usually be awarded costs.

Alternative dispute resolution

30 Are the parties to litigation or arbitration required to consider or submit to any alternative dispute resolution before or during proceedings?

No, there is no compulsory requirement for parties intending to litigate to consider or submit to any prior alternative dispute resolution process.

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