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THE FUTURE OF E-ARBITRATION IN MALAYSIA: A PRELIMINARY ANALYSIS OF THE LEGITIMACY OF E-ARBITRAL AGREEMENT AND PROCEDURES

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ABSTRACT

Using electronic technology in the dispute resolution industry has been encouraged globally. Electronic arbitration (e-arbitration) is one of the main online dispute resolution mechanisms, and it should be implemented in Malaysia because of its significant advantages. Unfortunately, the future of e-arbitration in Malaysia is still hazy. Therefore, it is important to examine whether existing Malaysian laws are sufficient to legalise the e-arbitral agreement and e-arbitral proceedings. This article is based on a research carried out for a doctoral degree. Primary and secondary sources were consulted. The novelty of the contribution has provided legal evidence and arguments

that the relevant laws in Malaysia were to some extent, modern and advanced to recognise e-arbitration. However, from a purely legal perspective, several gaps should be appropriately addressed by Malaysian lawmakers in order to ensure the sustainable and successful establishment of e-arbitration in the country.

Keywords: Traditional arbitration, E-arbitration, dispute resolution, online dispute resolution.

INTRODUCTION

Many parties prefer to submit their disputes for traditional arbitration because of its flexibility as compared to litigation. However, traditional arbitration was not a suitable choice in the fourth-generation era (Labanieh, Hussain, & Mahdzir, 2019), where the use of cyberspace has increased dramatically. Currently, everything can be performed through cyberspace, including dispute resolution through the use of online dispute resolution (ODR) mechanisms. Indeed, ODR has emerged since the early 1990s (Katsh, 2008). It has been based on the use of information technology (hereinafter referred to as “IT”) (Lodder & Zeleznikow, 2010). ODR methods could take place wholly or partly online, and they could handle both online and offline disputes (Goodman, 2003). Whereas Alternative Dispute Resolution (ADR) mechanisms, for instance traditional mediation or traditional arbitration, involved a triangle of “two parties and a neutral third party, such as mediator or arbitrator, ODR introduces the fourth party, which is technology (Katsh & Rifkin, 2001), that works with the third party (Rifkin, 2001) to improve the efficiency of the third party, and provide further support to the parties (Barriault, 2015).

The purpose of ODR was not to challenge and replace the current legal regime or ADR processes (Katsh & Einy, 2017), but rather, it was aimed at providing the disputing parties with modern mechanisms that were inexpensive and speedy in solving arguments (Tyler & McPherson, 2006). Thus, the benefits offered by ODR should not be underestimated (Croagh, Thomas & Rahul, 2017). It is important to note that there has been no uniform definition of ODR (Ebner & Zeleznikow, 2015), leading ODR to have several meanings (Hörnle,

2002). Based on the UNCITRAL Technical Notes on ODR 2016, ODR was a “mechanism for resolving disputes through the use of electronic communications and other information and communication technology.” (UNCITRAL Technical Notes on ODR 2016, article v (24)).

The most famous ODR mechanisms were e-negotiation (automated and assisted e-negotiation), e-mediation, and e-arbitration (Schultz, 2011). Virtual Magistrate project (VM project) was the first e-arbitration system that was established in 1995 (Kallel, 2008). Even though the VM project did not achieve its purposes (Sewart & Matthews, 2002), it paved the way for emerging other e-arbitration providers, such as the Cyber Tribunal.

Currently, there are several e-arbitration service providers, for example, the UK eCourt and Net-ARB. Undoubtedly, e-arbitration offers several advantages. For instance, it has helped in reducing cost (Biukovic, 2002) because *the arbitral proceedings were made wholly or partially online* (Wahab, 2012); reduced the administrative fees imposed by the traditional arbitration centre (Biukovic, 2002), because the working routine of the administrative staff would be different; it was simple, flexible, and fast (Labanieh & Hussain, 2020), time-saving (Huang, 2019), *convenient and efficient* (Labanieh, Hussain, & Mahdzir, 2020) because the parties could submit or check their case anytime and anywhere; it was *useful for those who were located in different jurisdictions* (Labanieh, Hussain, & Mahdzir, 2019); and finally, it was less-formal and less-intimidating than traditional arbitration and litigation (Schmitz, 2010) because it did not require face to face (F2F) meetings and interactions. Regardless of these advantages as highlighted in previous studies, the following two legislations, namely the Arbitration Act 2005 (Act 646) (hereinafter referred to as “Act 646”) and I-Arbitration Rules 2018 (hereinafter referred to as “Rules 2018”) have certainly confirmed *the legitimacy of the e-arbitration agreement and e-arbitration procedures.*

METHODOLOGY

This article has employed a doctrinal legal research methodology. The data was collected by using a library-based approach. Specifically, the

primary data were collected from Acts, Laws, Conventions, and Court Cases. For instance, the article has analysed relevant legislations relating to traditional arbitration and e-arbitration, namely the Act 646, Rules 2018, Netherlands Arbitration Institute-Arbitration Rules 2015, German Arbitration Institute-Arbitration Rules 2018, Additional Procedures for On-line Arbitration 2004, World Intellectual Property Organisation-Expedited Arbitration Rules, China International Economic and Trade Arbitration Commission-Online Arbitration Rules 2009, UNCITRAL Arbitration Rules 2013, Dutch Code of Civil Procedure 2015, New York Convention 1958, United Nations Convention on the Use of Electronic Communications in International Contracts 2005, Model Law on Electronic Commerce 1996, Model Law on Electronic Signatures 2001, Model Law on International Commercial Arbitration 1985, and the European Union Directive on Electronic Signatures 1999/93/EC. Moreover, the secondary data were collected from relevant sources, such as textbooks, journal articles, and reputable websites. Finally, in this article, both primary and secondary data were critically and analytically examined by using the content analysis approach.

THE LEGITIMACY OF E-ARBITRATION AGREEMENT IN MALAYSIA

The following discusses the formal and substantive requirements of a valid e-arbitral agreement according to Act 646 and New York Convention 1958 (NY Convention 1958).

The Formal Requirements of a Valid E-Arbitration Agreement

The traditional arbitral agreement is a contract (Nevisandeh, 2015), and it is a necessary element for enforcing the subsequent traditional arbitral award (The NY Convention 1958, article V (1) (a); Act 646, section 39 (1) (a) (ii)). In the context of this *article*, the e-arbitration agreement is an essential document in e-arbitration (Chakraborty, 2020), and it is an e-contract (Al Bahji, 2017). The major difference between the e-arbitral agreement and the traditional arbitral agreement is that, the parties in the traditional arbitral agreement conclude and enter into their agreement physically (in-person), instead of electronically as is the case in the e-arbitral agreement (Amro, 2019).

For this reason, the e-arbitral agreement is defined as an arbitration agreement that is formed via electronic communications (Wang, 2018). In short, it is classified as a remote contract.

Before discussing the validity of e-arbitration agreement under Act 646 and the NY Convention 1958, it is important to discuss the types of *traditional* arbitral agreement and the formal requirements of a valid traditional arbitral agreement. In fact, *traditional* arbitral agreement comes in two forms, namely the submission agreement “*acte de compromis*”, and the arbitral clause “*clause compromissoire*” (Dutson, Moody & Neil Newing, 2012). The major distinction between these two forms is that the submission agreement takes place after the dispute arises, while the arbitral clause takes place before the dispute arises.

Regarding the formal requirements of a valid traditional arbitral agreement, it is vital to note that traditional arbitration laws have adopted and followed diverse approaches regarding the formal requirements of a valid traditional arbitral agreement. Some arbitration laws have adopted a consensual approach (there are no specific formal requirements) (French Code of Civil Procedure 2011, article 1507). Therefore, the arbitral agreement concluded in digital or electronic form is valid and has the same legal effect as a traditional arbitral agreement. Contrarily, other arbitration laws followed a formalised approach. They obligate the parties to follow specific formal requirements when entering into a traditional arbitration agreement, such as to require the arbitral agreement to be in writing (English Arbitration Act 1996, article 5 (1)). While other arbitration laws impose additional requirements besides the standard formal requirements; this includes the need to provide an expression of the intention to apply for arbitration (Chinese Arbitration Law 1994, article 16). In the Malaysian context, section 9 (3) of *Act 646* adopted a formalised approach because it stipulates that the traditional arbitral agreement shall be in writing.

In this regard, it is important to examine whether e-arbitral agreement fulfils the formal requirement of “in writing” according to the Malaysian point of view. Currently, many countries compete to modernise their arbitration laws in order to be in line with modern technological developments. From a practical perspective, in the case

of *Shakti Bhog Foods Ltd. v. Kola Shipping Ltd.* AIR 2009 SC 12, the Apex Court in India upheld that the arbitral agreement entered into by exchange of e-mails, is valid. In the context of Malaysia, the formal requirement of a valid *traditional* arbitral agreement is regulated by the arbitration law. Therefore, reference is made to *Act 646* since the scope of this article is focusing on Malaysia. Indeed, Act 646 represents an important initiative by the Malaysian government to enhance the growth of traditional arbitration in the country. Section 9 (4) (a) of this Act has already recognised the arbitral agreement concluded *by conduct, or orally, or by other means, thus provided the fact that its content is recorded in any form*. It states that;

“An arbitration agreement is in writing- 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.”

Furthermore, Act 646 addresses the development in the communication technologies, for instance, section 9 (4A) of *Act 646* expands the definition of “in writing” to include electronic communication. Specifically, it gives the arbitral agreement concluded by using data message, the same legal power as traditional arbitral agreement. It stipulates that;

“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.”

Also, section 9 (6) of *Act 646* states that;

“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, electronic mail, telegram, telex or telecopy.”

Several facts can be identified from the above sections. Firstly, the primary purpose behind the term “recorded” as mentioned in section

9 (4) (a) is to demonstrate the conclusion of the traditional arbitral agreement between the parties and prove the parties' intention to resolve their actual or potential dispute through traditional arbitration. Secondly, the requirement of "in writing" mentioned in Act 646 is satisfied by a data message like e-mail, if the information included therein is available for subsequent reference. This subliminally signifies that the arbitral agreement, which is concluded by using data message, fulfils the formal requirement of "in writing". Hence, it is valid and legitimate under Act 646.

Thirdly, section 9 (6) of Act 646 is comprehensive because it covers all situations where information, such as e-arbitral agreement, is sent, generated, stored, or received in the form of a data message, regardless of the medium or technology used. This would ensure that the definition of a data message can accommodate future technological developments. Based on previous arguments and facts, it seems that Act 646 removes the obstacles faced all along in the establishment of e-arbitration in Malaysia because it fulfils one of its legal requirements (the e-arbitral agreement). This would create a favourable and suitable environment to establish e-arbitration in Malaysia.

In another context, Malaysia has signed the NY Convention 1958 on 5th November 1985. The NY Convention 1958 contains two conventions. The first convention governs the conclusion and recognition of the traditional arbitration agreements (The NY Convention 1958, article II), and it was the last-minute addition to the convention's text (Mistelis, 2015). The second convention governs the recognition and enforcement of the non-domestic and foreign arbitral awards (The NY Convention 1958, article I). Regarding the formal requirements of a valid traditional arbitral agreement, article II (1) of the *NY Convention 1958* states that "Each Contracting State shall recognise an agreement in writing" (Ibid, article II (1)). Article II (2) further explains the meaning of "in writing" by providing two options for fulfilling this requirement, namely, the arbitral clause/agreement signed by the parties (option I); and the arbitral clause/agreement that was contained in an exchange of letters or telegrams (option II) (Ibid, article II (2)). It is also essential to note that article II (2) sets the maximum requirements (Lew, Mistelis & Kröll, 2003) for a valid *traditional* arbitral agreement. This means that if the traditional arbitral agreement meets the requirements mentioned

in article II of the *NY Convention 1958*, it should be enforced by the national Contracting State, irrespective of any strict conditions and requirements imposed by its national arbitration law (Ibid).

According to option II, the traditional arbitral clause/agreement, which is contained in an exchange of letters or telegrams, is valid and legal even without the signatures of the parties (Mistelis, 2015) because the content of the correspondence between them is enough to demonstrate their intentions and achieve the purpose of using a signature (Arsic, 1997). Regarding the validity of the *traditional* arbitral agreement that is signed electronically, according to the *NY Convention 1958*, it is essential to note that the arbitral agreement mentioned in article II (2) of this convention covers the arbitral agreement that comes in traditional form “paper form” and contains the traditional “hand-written” signature of the parties. However, it does not cover the arbitral agreement that comes in electronic/digital form and contains the parties’ e-signatures because the *NY Convention 1958* was enacted before the emergence of electronic technologies, such as e-signature. For this reason, several international laws and conventions may provide solutions to legitimise the arbitral agreement that comes in electronic/digital form and carries the parties’ e-signature (UNCITRAL Model Law on Electronic Commerce 1996, article 7; UNCITRAL Model Law on Electronic Signatures 2001, article 6; European Union Directive on Electronic Signatures 1999/93/EC, article 5).

This *article* focuses on one significant convention, known as the United Nations Convention on the Use of Electronic Communications in International Contracts 2005. (hereinafter referred to as the “UECIC 2005”). This convention may legalise e-writing and e-signature in the context of article II because it can be directly applied to the *NY Convention 1958*. The UECIC 2005 defines electronic communication as “any communication that the parties make by means of data messages” (UECIC 2005, article 4 (b)). It also defines data message as “information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy” (UECIC 2005, article 4 (c)). Regarding the validity of e-writing, article 9 of the UECIC 2005 provides legal recognition of e-writing. For instance, article 9 (2) of the UECIC 2005 states that;

“Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.”

Also, article 9 determines the required conditions to establish the functional equivalence between e-signatures and traditional (hand-written) signatures by analysing how the e-signature can fulfil the function and purpose of the traditional signature. More specifically, the respective article states that;

“Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if: (a) A method is used to identify the party and to indicate that party’s intention in respect of the information contained in the electronic communication; and (b) The method used is either: (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.”

Accordingly, it is evident that the digital/electronic file (such as an e-arbitral agreement) that contains the e-signatures of the parties, is valid, it thus provided the fact of e-signature as able to identify the signer and indicate his/her intention regarding the information contained in the electronic/digital file (such as an e-arbitral agreement). More specifically, the UECIC 2005 provides that the used e-signature is not required to pass the “reliability test” if the party’s intention and identity are proven in fact (UECIC 2005, article 9 (3) (b) (ii)). In this regard, under the UECIC 2005, either party cannot invoke the reliability test to revoke or repudiate his/her e-signature if his/her actual identity and intention can be proved (Ibid, paragraph 164). Furthermore, the UECIC 2005 enables the *NY Convention 1958* and other conventions

to operate in the online environment. In this regard, article 20 (1) of the UECIC 2005 states that;

“The provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract to which any of the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10th June 1958).”

Based on the above background overview on the e-arbitration agreement, the international laws and conventions, such as the Model Law on Electronic Commerce 1996 (MLEC 1996), the Model Law on Electronic Signatures 2001 (MLES 2001), and the UECIC 2005, it is clear that they all have indirectly recognised e-arbitration because they legalise the e-arbitral agreement without direct reference to e-arbitration. In other words, they treat the digital/electronic signature as a legal equivalent to the traditional “hand-written” signature. Furthermore, article 20 (1) of the UECIC 2005 makes it clear that the e-arbitral agreement would be valid and enforceable according to the NY Convention 1958. Therefore, the national Contracting States to the NY Convention 1958 should examine the possibility to enter into this convention.

Moreover, the principle of the *more-favourable-right provision*, contained in article VII (1) of the NY Convention 1958, could also provide a solution to the problem mentioned above. Although the application of this principle is limited to the recognition and enforcement of the foreign arbitral award under article IV, it can be applied in the context of article II of the NY Convention 1958. The reason is that several national courts upheld the legality of the traditional arbitral agreements in accordance with their national laws, even though they cannot be enforced according to article II of the NY Convention 1958. For example, in the case of *Petrasol BV v. Stolt Spur Inc.*, [1995] XXII YBCA 1997, the Court of First Instance, Rotterdam held that article II of the NY Convention 1958 does not impede the application of article 1074 CCP, because of the *more-favourable-right provision* in article VII of that convention, to be applied by analogy. Similarly, in 2006, the

UNCITRAL recommended the application of the principle of the *more-favourable-right provision* to article II of the NY Convention 1958. It states that;

“Article VII (1) of the Convention should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement (UNCITRAL, 2006, 62).”

There is no doubt that the principle of the *more-favourable-right provision* provides a practical approach to legalise the e-arbitral agreement, especially if the law of the enforcing national court is more modernised than article II of the NY Convention 1958. For example, the law of the enforcing national court, such as Malaysia, recognises the e-arbitral agreement. However, if the law of the enforcing national court is not legally modern to recognise the e-arbitral agreement, there is no advantage in relying on the principle of the *more-favourable-right provision*.

As for option II in the NY Convention 1958, the arbitral agreement is in writing if the arbitral clause/agreement is contained in an exchange of telegrams or letters (The *NY Convention 1958*, article II (2)). Indeed, the literal interpretation of option II would lead one to refuse the arbitral agreement contained in an exchange of e-mail, because e-mail is not the one communication means mentioned in article II (2) of the NY Convention 1958 (option II). For this reason, two solutions are presented to legalise the arbitral agreement contained in an exchange of e-mail. The first solution is by applying the principle of the *more-favourable-right provision* (this solution was highlighted in the previous discussion).

The second solution can be seen by following the recommendation mentioned by the UNCITRAL in 2006. It recommends the national Contracting States to employ article II (2) of the NY Convention 1958, taking into account that the circumstances and conditions specified therein are not comprehensive and exhaustive (Ibid). This means that article II (2) can cover other types of electronic communications, along with letters or telegrams. From a practical perspective, in the case of

the *Lombard-Knight v. Rainstorm Pictures Inc.*, [2014] EWCA Civ 356, the English Court of Appeal stated that the exchange of e-mails is similar as the exchange of telexes and faxes, and legitimates the arbitral agreement. In the same vein, in the case of *Compagnie de Navigation et Transport SA v. MSC-Mediterranean Shipping Company*, [1996] XXI YBCA 690, the Swiss Federal Tribunal held that;

“In the statement of the Swiss Supreme Court, arbitration clauses are legitimate under the NY Convention, in which they are either in an exchange of letters, telexes, telegrams and other means of communication or contained in a signed contract.”

Finally, it is significant to note that when the NY Convention 1958 was enacted, the implicit intention of its drafters was to catch up with technological developments that existed at that time (Wahab, 2004). Hence, enforcing national courts in the Contracting States have to recognise the e-arbitral agreement by following the recommendations of the UNCITRAL or interpreting article II (2) of the NY Convention 1958 in accordance with the international laws and conventions, such as the Model Law on International Commercial Arbitration (hereinafter referred to as “MLICA 1985 *amended in 2006*”) or the UECIC 2005.

The Substantive Requirements of a Valid E-Arbitration Agreement

The following discusses the substantive requirements of a valid e-arbitral agreement. This includes the consent of the parties to the e-arbitral agreement, the eligibility of the parties to the e-arbitral agreement, and the arbitrability of the subject matter of the dispute in e-arbitration.

The Consent of the Parties to the E-Arbitral Agreement

Traditional arbitration relies on the parties’ consent (Rajoo, 2017) because there is no arbitration without consent (Spoorenberg & Fellrath, 2012). In traditional arbitration, parties express their consent in a physical environment. Whereas in e-arbitration, parties express their consent through several types of electronic means, such as

e-mail, internet reply chat (IRC), or clicking on the “I agree” button. Indeed, the expression of consent by using electronic means is valid according to the Electronic Commerce Act 2006 (Act 658).

Act 658 is modelled to a great extent on the MLEC 1996 (Palanissamy, 2013) and it is aimed at eliminating the obstacles faced by e-commerce in Malaysia. This Act does not apply to specific documents or transactions. This includes the creation of codicils and wills, a power of attorney, negotiable instruments, and the creation of trusts (Act 658, Schedule). Moreover, Act 658 describes “electronic message” (hereinafter referred to as “ES”) as information sent, received, generated, or stored by electronic means (Ibid, section 5). It also defines “electronic” as the technology of utilising optical, electrical, electromagnetic, magnetic, photonic, biometric, or other similar technology (Ibid). Furthermore, section 7 of Act 658 deals with the validity and formation of the electronic contract. Sections 7 (1) and (2) of Act 658 states, respectively, that;

“In the formation of a contract, the communication of proposals, acceptance of proposals, and revocation of proposals and acceptances or any related communication may be expressed by an electronic message.”, and
“A contract shall not be denied legal effect, validity or enforceability on the ground that an electronic message is used in its formation.”

According to the discussions in the previous sections, it is obvious that Malaysian lawmakers have defined the term “electronic” broadly because the reference to “other similar technology” is meant to show that Act 658 is not only designated for application in the context of the prevailing electronic communications like e-mail, but also to accommodate future technological developments. Also, section 7 of Act 658 recognises the validity of ES in forming the e-contract. This means that the proposal (offer) and acceptance of a proposal (offer) presented in the form of an ES leading to the conclusion of a legitimate e-contract (Alibeigi & Munir, 2016), such as e-arbitral agreement. In other words, the parties to e-arbitration can express and communicate their consent through an ES, such as e-mail or by clicking on the “I agree” button.

Apart from the above, the parties' consent to enter into a traditional arbitral arbitration should be free from any defects like coercion (Born, 2012). For example, if one of the parties was influenced or induced to act against her/his will due to coercion, the agreement to arbitrate is null, and there is no real consent (Fagbemi, 2015). The same applies to e-arbitration (Anisa, 2017). For instance, the buyer usually enters into an e-agreement which would contain an e-arbitral clause and provided in advance on the seller's website by clicking on the "I agree" button.

One may argue that there is no place of coercion in this e-agreement, and the buyer's consent is valid because there is no physical or real risk that forced him/her to do so. However, coercion exists in this e-agreement, and the buyer's consent is null (Khaldy, 2009), because coercion may come due to a need (Ibid). This can be explained when an Islamic banking client (A) cannot get a loan from an Islamic bank (B), unless the Islamic banking client (A) accepts to enter into an e-agreement that contained an e-arbitral clause and provided in advance by the Islamic bank (B). This means that any future dispute should be resolved through e-arbitration, rather than using other resolution mechanisms, such as traditional arbitration or litigation. In this regard, there is a need to provide an Islamic banking client with various resolution options. For instance, the e-agreement should allow an Islamic banking client to recourse to either litigation or e-arbitration.

The Eligibility of the Parties to the E-Arbitral Agreement

In traditional arbitration, the existence of eligibility to conclude an arbitral agreement is a requirement for the legitimacy and validity of the resulting agreement (Born, 2012), and the same applies to e-arbitration (Al-Ateyat & Al-Dhahir, 2013). Moreover, the ineligibility of the party to enter into a traditional arbitral agreement constitutes a sufficient ground to refuse the enforcement of the traditional arbitral award under international arbitration laws (The NY Convention 1958, article V (1) (a)), and the national arbitration law, such as Act 646, section 39 (1) (a) (i). In e-arbitration, checking the parties' eligibility in business to business (B2B) disputes does not raise any legal problem because the practice of the commercial activity requires the trader (seller) to be registered in the commercial

register and to have a commercial certificate. This certificate should be uploaded on the trader's website to enable the buyer to verify the eligibility of the trader (seller) from the relevant commercial register.

In contrast, checking the parties' eligibility (the age of majority) in business to customer (B2C) disputes constitutes a legal dilemma. For instance, the website's users (buyers) may not reveal their real personal information to the owner of the website (seller) because of several reasons. Firstly, they are scared of the unsolicited use of information (Al Bahji, 2017). Secondly, the owner of the website (seller) would not be able to verify the information provided by the buyers. For this reason, the buyers would provide false or inaccurate information regarding their eligibility (the age of majority). In this regard, it is vital to analyze how to verify the parties' eligibility (the age of majority) in e-arbitration. Indeed, the party's eligibility to enter into a *traditional* arbitral agreement is regulated by the law to which he/she is subject (Bentolila, 2017). Hence, reference is made to the Malaysian law. For instance, section 11 of the Contract Act 1950 (Act 136) provides that "every person is competent to contract who is of the age of majority according to the law to which he is subject". Besides, under section 2 of the Age of Majority Act 1971 (Act 21), the age of majority in Malaysia is the age of eighteen (18) years. Therefore, the parties to the e-arbitral agreement should have reached the age of eighteen (18) years.

Regarding the adopted solutions to verify the eligibility of the parties (the age of majority) in e-arbitration, the literature has suggested the use of an electronic card, personal disclosure (Khaldy, 2009), or electronic certification authority (Al Bahji, 2017). In the context of this *article*, specifically in Malaysia, MyKad could play an essential role in identifying the buyer/customer, and verifying his/her eligibility (the age of majority). This occurs when a trusted third party has authenticated the MyKad provided by the party (buyer/customer) to the e-arbitral agreement. Specifically, MyKad provides several items of information, such as name, address, race, citizenship status (National Registration Department of Malaysia, 2020), and birth date that follows the format (YYMMDD-BP-###G) where (YYMMDD) represent the birth date of the holder. It also provides public key infrastructure (PKI) that includes personal key and digital certificate inside the MyKad (National Registration Department of

Malaysia, 2020). This would enable the participants in e-arbitration, such as parties and arbitrators, to use a digital signature to ensure the confidentiality and integrity of the data and information given by them during the e-arbitral proceedings.

The Arbitrability of the Subject Matter of the Dispute in E-Arbitration

The arbitrability of the subject matter of the dispute refers to its capability of being resolved by traditional arbitration (Chan, 2011). Moreover, the parties' freedom to have recourse to traditional arbitration is restricted because the national and international arbitration laws require the subject matter of the dispute to be arbitrable, otherwise, the traditional arbitral award would not be enforced (English Arbitration Act 1996, article 103 (3); *Act 646*, section 39 (1) (b) (i); The NY Convention 1958, article V (2) (a); MLICA 1985 amended in 2006, article 36 (1) (b) (i)). For instance, if the subject matter of the dispute concerns personal matter and public order, the dispute cannot be resolved through traditional arbitration (Palestinian Arbitration Law No.3 (2000), article 4). Thus, the parties cannot have recourse to traditional arbitration if their traditional arbitral agreement covers any of these matters, or otherwise, the subsequent traditional arbitral award will not be enforced. In e-arbitration, the situation is no different because the subject matter of the dispute should also be e-arbitrable (Anisa, 2017).

In Malaysia, the ambit or meaning of arbitrability was indirectly discussed by the Malaysian Courts (Choy & Rajoo, 2017), because in the case of *Shaharuddin bin Ali v. Superintendent of Lands and Surveys Kuching Division*, [2005] 2 MLJ 555, the Malaysian High Court had indirectly addressed the issue of whether the claim or dispute on the basis of native customary rights should be considered as arbitrable or not (Choy & Rajoo, 2017). It was argued that the operative word of the provision in the Sarawak Land Code utilised the word 'May'; hence, the plaintiffs should not be forced to refer the dispute to traditional arbitration. Moreover, under Act 646, the arbitration dispute is not required to be commercial in nature. Specifically, section 4 (1) of *Act 646* states that "any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration".

Apart from this, some exceptions are identified. For instance, the second sentence of section 4 (1) states that any dispute may be determined by traditional arbitration except if the arbitral agreement is against the Malaysian public policy, or the subject matter of the dispute could not be settled by traditional arbitration under the Malaysian laws (Act 646, section 4 (1)). Another important aspect of this matter is that section 4 (2) of *Act 646* stipulates that if any Malaysian written law does not indicate that a specific dispute can be resolved by arbitration, this cannot be interpreted that a such dispute cannot be resolved by arbitration.

Based on the above, there is nothing that prevents the application of section 4 of Act 646 in the context of e-arbitration. By the application of analogy, any dispute may be determined by e-arbitration, unless the e-arbitral agreement is against the Malaysian public policy, or the subject matter of the dispute could not be settled by e-arbitration under Malaysian laws. However, it would be useful at the first stage if the Malaysian lawmakers determine exactly the subject matters of the disputes that can be settled through e-arbitration. This would enhance the legal certainty of using e-arbitration in Malaysia because the parties would not have recourse to e-arbitration, unless they are sure that the Malaysian High Court will enforce their e-arbitral award. At the second stage, the Malaysian High Court should strive to not interfere in e-arbitration, such as the issue of arbitrability (Act 646, sections 37 (1) (b) (i); 39 (1) (b) (i)).

THE LEGITIMACY OF THE E-ARBITRATION PROCEDURES IN MALAYSIA

The arbitral proceedings in e-arbitration are conducted by using electronic means, such as e-mail, chat room, teleconferencing, and video conferencing (Amro, 2019). The following discusses the e-arbitral proceedings and examines their legitimacies according to *Act 646* and Rules 2018.

The Validity of E-Request in E-Arbitration

Once a claimant decides to start traditional arbitration, he/she has to send to the opposing party (“counterparty” or “respondent”) a

written document, known as a “request for arbitration” or a “notice of arbitration” (Dutson, Moody & Newing, 2012). In Malaysia, the general rule stipulates that traditional arbitral proceedings start when a respondent receives from a claimant a request in writing to refer their dispute to arbitration (Act 646, section 23). In the AIAC, the party initiating arbitration under Rules 2018 should submit a written request to commence arbitration (Rules 2018, rule 2). In *e-arbitration*, the submission of a request for e-arbitration is made electronically (Jaberi, 2012) by uploading a request to the designated e-platform. *Based on this, the question which arises here is “whether an e-request is valid according to Act 646 and Rules 2018?”*

Before answering this question, *it is important to note that* many countries have recognised the *e-request for arbitration* (Netherlands Arbitration Institute-Arbitration Rules 2015, article 3 (2); German Arbitration Institute-Arbitration Rules 2018, article 4 (2); Additional Procedures for On-line Arbitration 2004, article 5 (1)). *In the context of this article, two solutions could help in legalising the e-request. From a logical point of view,* the rationale behind the need for sending a request “in writing” is to inform a respondent about the dispute against him/her and avoid a respondent’s negation; for instance, he/she did not receive a request for arbitration from the claimant. However, the use of electronic means, such as e-mail, may achieve the purposes mentioned above because e-mail would enable a respondent to be informed about a dispute against him/her and provides proof of sending and receiving.

From a legal perspective, section 23 of *Act 646* may also provide a *satisfactory solution to legalise e-request. This section states that;*

“Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request in writing for that dispute to be referred to arbitration is received by the respondent.”

Based on the above section, the sentence “unless otherwise agreed by the parties” reflects the non-mandatory essence of section 23 of Act 646 and provides the parties with the flexibility to agree otherwise. For example, they can agree that the *arbitral proceedings regarding*

any dispute will start on the date when a respondent received a request in electronic/digital form, rather than in traditional form “paper form”. In contrast, under Rules 2018, the e-request is not valid, because rule 2 (1) obligates the party to submit a request in writing to commence arbitration. Regardless of the previous facts, the Malaysian lawmakers should amend section 23 of Act 646 and rule 2 (1) of Rules 2018 to legalise the e-request.

The Validity of E-Notification in E-Arbitration

Notification is a very significant procedural step in traditional arbitration. In Malaysia, the parties should be given reasonable prior notice of any hearing and any meeting of the arbitral tribunal for the purposes of inspection of documents, goods, or other property (Act 646, section 26 (3)). Moreover, if the right of notification has been breached, the arbitral award would be challenged in the Malaysian High Court (Ibid, sections 37 (1) (a) (iii); 39 (1) (a) (iii); The NY Convention 1958, article V (1) (b)). In e-arbitration, the notification is made in the electronic way (World Intellectual Property Organisation-Expedited Arbitration Rules, article 4 (a); China International Economic and Trade Arbitration Commission-Online Arbitration Rules 2009, article 10). In this regard, the question which arises here is “whether the e-notification is valid under Act 646 and Rules 2018?” Indeed, party autonomy is a fundamental principle in traditional arbitration. Redfern and Hunter have stated that;

“Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organisations (Redfern & Hunter, 2004, 265).”

The principle of party autonomy is recognised by the *MLICA 1985, amended in 2006*. Article 19 (1) states that:

“Subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.”

According to the Commentary, article 19 (1) is the most significant article in the MLICA 1985, *amended in 2006*, because it recognises the parties' freedom to determine the rules of procedure (UNCITRAL, 1985). This freedom enables the parties to design the rules in accordance with their needs and desires. They can do so by formulating their own set of rules by which the arbitral procedures will be conducted; referring to standard rules for institutional (administered) arbitration or pure ad hoc arbitration, or opt for a procedure applied in a specific legal system (Ibid). *In the Malaysian context, Act 646 is based on the MLICA 1985, amended in 2006.* Section 21 (1) of Act 646 is similar to article 19 (1) of the MLICA 1985, *amended in 2006*. It states that;

“Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.”

A closer look at section 21 (1) shows that the principle of party autonomy has been ensured and recognised. This means that the parties can select or tailor the rules of procedure according to their specific needs and wishes. For instance, the parties can agree on using electronic means, such as e-mail, to conduct the notification. Moreover, section 21 (2) of *Act 646 states that*;

“Where the parties fail to agree under subsection (1), the arbitral tribunal may, subject to the provisions of this Act, conduct the arbitration in such manner as it considers appropriate.”

Indeed, section 21 (2) provides the arbitral members with comprehensive discretion to handle the arbitration in such manner as it deems suitable (only if the parties failed to do so). In simple words, the arbitral members could agree on using any type of electronic means for the purpose of notification. *Moreover, it is worth noting that section 21 aims to suit the different needs and wishes of the parties involved, and it protects traditional arbitration from any constraints imposed by the Malaysian laws, including the rules on evidence.*

For instance, under Act 646, the arbitral tribunal has the authority to determine the materiality, relevance, admissibility, and weight of any evidence (Act 646, section 21 (3) (a)). Section 2 of the Evidence

Act 1950 (Act 56) also states that “*this Act shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator*”. In the context of Rules 2018, the first sentence of rule 6 provides the arbitral tribunal with the right to carry out the arbitration in such manner as it deems suitable. *Therefore, the arbitral tribunal may also decide on using electronic means, such as the e-mail, for the purpose of notification.*

Based on the previous discussions, it seems that e-notification is indirectly valid under sections 21 (1) and (2) of Act 646 and rule 6 of Rules 2018. However, there is a need to introduce a new section and rule to regulate clearly and directly the e-notification. Finally, it is important to note that the risk of non-receipt of e-notification by the interested parties to e-arbitration constitutes the main disadvantage of e-notification (Georgievna & Evgenievna, 2017). Hence, Act 646 and Rules 2018 should provide several legal measures to reduce the risks associated with e-notification, such as the risk of non-receipt and non-delivery.

The Validity of E-Hearing in E-Arbitration

In traditional arbitration, the hearing sessions are held in a physical place, such as at the law firm offices or hotel conference rooms. While in e-arbitration, the hearing sessions are held in the online environment by using several types of electronic means, such as teleconferencing and video conferencing (Amro, 2019). Using electronic technologies to conduct oral hearing have been allowed in many e-arbitration laws, including some traditional arbitration laws (Rules 2018, rule 12; UNCITRAL Arbitration Rules 2013, articles 28 (3); Dutch Code of Civil Procedure 2015, article 1072b (4); China International Economic and Trade Arbitration Commission -Online Arbitration Rules 2015, article 33; International Chamber of Commerce-Rules of Arbitration 2017, article 24 (4)).

In the context of this *article*, it is significant to examine whether e-hearing is valid according to Act 646. Section 26 of Act 646 deals with the oral hearings in traditional arbitration. More specifically, section 26 (1) addresses only the parties’ general entitlement to the oral hearings, but it does not regulate the procedural aspects of the oral hearings, for instance, the number of hearings. Besides, section 26 of

Act 646 does not mention how the oral hearings should be conducted in traditional arbitration. This implies that oral hearings should be made traditionally, using face to face (F2F) method. Nevertheless, e-hearing is valid according to Act 646 because sections 21 (1) and (2) of *Act 646* allow the arbitral tribunal or the parties to agree on conducting the oral hearings electronically (the justification was discussed in sub-chapter of the validity of the e-notification).

Another solution to legalise e-hearings is by invoking section 22 (3) of Act 646. *This section allows the arbitral tribunal to meet at any place it deems suitable for consultation among its members, hearing experts, witnesses, or the parties, or inspection of documents or goods.* So, it is argued that pursuant to section 22 (3), there is no legal constraint that can prevent the arbitral tribunal from selecting the “internet” as an appropriate place to conduct the oral hearings. In this case, the participants, such as parties and arbitrators, need to use electronic means to carry out the oral hearings. In a thorough review of the previous legal viewpoints, e-hearing is indirectly valid and legitimate according to *Act 646*. However, *Act 646* and Rules 2018 should appropriately regulate the e-hearings by providing guidelines and protocols to ensure fairness and equal treatment in e-hearings.

The Validity of E-Submission and E-Exchange of Documents in E-Arbitration

The exchange and submission of documents in e-arbitration are made electronically by using *the* e-mail or a web-based platform (FastArbitre arbitration rules, article 6 (1)). In this regard, it is important to examine whether *Act 646* and Rules 2018 are sufficient to recognise the e-exchange and e-submission of documents. First of all, using electronic technologies for the exchange and submission of documents would positively impact the e-arbitral processes, because they enable the participants, such as parties and arbitrators, the opportunity to exchange documents and information quickly and easily.

In the context of this *article*, the Malaysian arbitration laws, such as *Act 646* and Rules 2018, are less straightforward in legalising the e-exchange and e-submission of documents. Nevertheless, by invoking sections 21(1) and (2) of *Act 646* and rule 6 of Rules 2018, the e-submission and e-exchange of documents should not constitute

a legal stumbling block because it is indirectly valid and legitimate (the justification was discussed in sub-chapter of the validity of the e-notification). Regardless of the points of law highlighted in the above discussions, the lawmakers in Malaysia should bring a new section/rule to *Act 646* and Rules 2018 in order to legalise the e-submission and e-exchange of documents. This would ensure the effective establishment of e-arbitration in Malaysia.

Equal Treatment in E-Arbitration

Equal treatment means that the arbitral tribunal must treat the parties equally and give them equal opportunity to present their arguments (Khaldy, 2009). The right of equal treatment has been recognised globally. For instance, article 31 (b) of the WIPO-Expedited Arbitration Rules states that,

“In all cases, the Tribunal shall ensure that the parties are treated with equality and that each party is given a fair opportunity to present its case.”

In Malaysia, section 20 of *Act 646* sets out the essential requirements that should be observed by the arbitral tribunal to ensure procedural justice in traditional arbitration. In particular, it obligates the arbitral tribunal to treat the parties with equality and give each party a reasonable and fair opportunity to present his/her case. The same position is adopted by article 17 (1)-Part II of Rules 2018. However, section 20 and article 17 (1) are not following article 18 of the *MLICA 1985, amended in 2006*, because the latter obligates the arbitral tribunal to give each party a “full opportunity” to present his/her case. Furthermore, the violation of the right to equal treatment will enable the interested party to challenge the traditional arbitral award under section 39 (1) (a) (iii) of *Act 646* and article V (1) (b) of the *NY Convention 1958*. From a practical perspective, in the case of *Kanoria v. Guinness*, [2006] EWCA Civ 222, the England and Wales Court of Appeal rejected the appeal to enforce the arbitral award on the ground that the arbitral tribunal did not allow the respondent to present his case, as the respondent could not attend due to serious sickness.

In the context of e-arbitration, the violation of the right to equal treatment constitutes a major problem that hinders the enforcement

of the e-arbitral award at the enforcing national court (Amro, 2019). More specifically, the right of equal treatment will be violated, if either party lacks in technical ability to participate in the case (Georgievna & Evgenievna, 2017), he/she has no access to the internet with a similar connection speed to the other party (Zheng, 2017), or he/she has no sufficient knowledge *in using the technologies* required in e-arbitration (Khaldy, 2009). In the light of the previous arguments, it is evident that the Malaysian arbitration laws, such as Act 646 and Rules 2018, do not determine the circumstances that might breach the right of equal treatment in the online environment where e-arbitration operates. Hence, the Malaysian lawmakers should amend section 20 of Act 646 and article 17 (1)-Part II of Rules 2018.

CONCLUSION

In summary, the use of the e-arbitration mechanism in Malaysia is not impossible and will facilitate access to justice cheaply, effectively, and smoothly. Furthermore, Malaysian laws, such as the Act 646 and Rules 2018, are to some extent, modern and advanced to recognise the legal requirements for establishing e-arbitration, and they are the significant steps taken by the Malaysian lawmakers to integrate electronic technologies in the dispute of resolution industry. However, several legal gaps have to be appropriately addressed by the lawmakers in Malaysia in order to ensure the effective and sustainable establishment of e-arbitration in Malaysia.

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