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E-ARBITRAL IN MALAYSIA: ISSUES, CHALLENGES, AND OPPORTUNITIES

[1]Mohamad Fateh Labanieh, [2]Zainal Amin Ayub & [3]Harlida Abdul Wahab
Legal and Justice Research Center (LJRC),
School of Law, Universiti Utara Malaysia, Malaysia

[1]Corresponding author: fatih.labanie@gmail.com

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ABSTRACT

The shift from traditional arbitration to electronic arbitration (hereinafter referred to as "e-arbitration") has been driven by several factors, including the increasing availability of technology and the need for more efficient and cost-effective dispute resolution in a globalised world. E-arbitration has been well-received because of its remarkable advantages, including increased efficiency, reduced costs, and improved accessibility, making it an attractive alternative to traditional arbitration. However, to date, the adoption of e-arbitration has not been as expected and the legal position surrounding the legitimacy of the electronic arbitral award (hereinafter referred to as "e-arbitral award") in Malaysia has yet to be established. This requires a careful examination of existing laws and regulations, as well as a careful consideration of potential challenges and opportunities. This article has been grounded in doctrinal legal research where primary

and secondary sources were collected through a library-based approach and later examined using critical and analytical approaches. The use of e-arbitration in Malaysia is expected to encounter several legal challenges since it is not yet fully regulated. However, the present study has found that Malaysian national laws, including the current arbitration laws, are relevant, sufficient, and relatively developed to legalise e-arbitral award. It has also discovered several legal loopholes that must be adequately and directly considered by Malaysian lawmakers. This will enhance the sustainable establishment of e-arbitration in Malaysia and ensure the protection of the interests and rights of all parties involved. Finally, this study has proposed two models for predicting e-arbitral award by human-arbitrators and for enforcing e-arbitral award under the auspices of the AIAC.

Keywords: Online Dispute Resolution (ODR), dispute resolution, e-arbitration, traditional arbitration, arbitral award.

INTRODUCTION

Cyberspace has revolutionised the way we work, live, and communicate, for example, it has greatly affected the speed at which e-commerce disputes can be resolved. With the rise of online transactions, many disputes can now be settled efficiently and quickly through the use of technology. More specifically, the first Online Dispute Resolution (hereinafter referred to as "ODR") platform was created in the late 1990s (Lodder & Zeleznikow, 2010) as a means of resolving disputes arising from e-commerce transactions (Katsh, 2006). The global COVID-19 pandemic has witnessed a heightened shift towards utilising ODR as a way to settle disputes while reducing in-person contact, making it a widely accepted practice to date.

Alternative Dispute Resolution (hereinafter referred to as "ADR") and ODR are related, yet distinct. ADR mechanisms, such as traditional arbitration or traditional mediation, entail a tripartite structure consisting of two disputing parties and an impartial third party acting as either a mediator or an arbitrator. However, the emergence of ODR has introduced a fourth party, commonly referred to as "technology" (Katsh & Rifkin, 2001). This technology dimension serves to enhance the efficacy of the third party, thereby providing additional support

to the involved parties (Barriault, 2015). As noted by Katsh and Einy (2017), the aim of ODR is not to undermine or replace existing legal systems, or ADR procedures. Instead, it provides disputing parties with additional cost-effective and speedy methods of resolving conflicts (Tyler & Mcpherson, 2006). As a matter of fact, the advantages provided by ODR should never be disregarded (Croagh et al., 2017).

ODR lacks a standardised definition and therefore, has multiple interpretations (Ebner & Zeleznikow, 2015; Hörnle, 2002). Accordingly, ODR is defined as "a mechanism for resolving disputes through the use of electronic communications and other information and communication technology" (UNCITRAL Technical Notes on Online Dispute Resolution 2016, section V (24)). It generally encompasses the use of technological tools like websites, software, or digital platforms to settle disputes between parties. This can involve utilising mechanisms such as e-negotiation, e-mediation, or e-arbitration that may be conducted completely or partially online (Schultz, 2011). In fact, *e-arbitration and traditional arbitration share more similarities than differences as they are both governed by the same legal principles. The primary distinction between the two lies in their mode of operation. While traditional arbitration relies on in-person communications and interactions (hereinafter referred to as "Face to Face" or "F2F"), e-arbitration is conducted solely through electronic means* (Markert & Burghardt, 2017; Schultz, 2010).

Compared with other ODR mechanisms, it is worth mentioning that e-arbitration operates through asynchronous communication, in contrast to e-mediation which requires more F2F interactions and communication (Schmitz, 2010). Furthermore, the role of the neutral third party in e-arbitration, typically an arbitrator, is endowed with the authority to issue a legally binding e-award to the parties involved, particularly in instances where binding e-arbitration is applicable. As a result, e-arbitration has the ability to resolve disputes without the need for additional ODR methods. However, the challenges faced in e-arbitration are primarily legal rather than technological, unlike e-mediation (Haloush, Melhem, & Malkawi, 2008).

Moreover, both e-negotiation and e-mediation are methods of resolving disputes online, but they differ in their approach and level of formality. E-negotiation involves direct communication

between the parties to reach a mutually acceptable solution, with the option for assisted negotiation using tools and algorithms to guide the discussions. Conversely, the process of e-mediation entails the involvement of an impartial third-party mediator who streamlines the communication between disputing parties to reach a jointly agreeable resolution. Unlike e-arbitration, the mediator in e-mediation has no authority to make a binding decision. Instead, their role is to guide the parties towards a mutually satisfactory outcome. Consequently, the e-mediation process is comparatively more structured than the one in e-negotiation.

The origins of e-arbitration can be traced back to the Virtual Magistrate project, which was founded in 1996 (Zheng, 2020) and is regarded as the pioneering e-arbitration system (Kierkegaard, 2004). Despite its failure to achieve the original objectives, the project paved the way for the emergence of other e-arbitration platforms, such as the Arbitration Court affiliated with the Economic Chamber and the Agricultural Chamber of the Czech Republic (*hereinafter* referred to as "ECACCR-Arbitration Court") (Arbitration Court, 2023).

The ECACCR-Arbitration Court deals with a variety of disputes, including commercial, domain name, and consumer disputes. It has specific rules known as the Additional Procedures for Online Arbitration 2004. The objective is to enable the conduct of arbitral proceedings and the resolution of disputes via the Internet (Additional Procedures for On-line Arbitration 2004, article 1 (1)). All proceedings within the ECACCR-Arbitration Court are conducted electronically (Additional Procedures for On-line Arbitration 2004, article 1 (2)) with the entire process, from filing a case to issuing a binding e-arbitral award, taking approximately 35 days (Arbitration Court, 2023).

Several literature reviews have contributed to the endeavours of defining e-arbitration. For example, e-arbitration has been described as a process that begins with a claimant registering their case with an e-arbitration service provider (Markert & Burghardt, 2017). Other researchers consider e-arbitration as simply a traditional arbitration proceeding that is conducted in cyberspace rather than through face-to-face communication (Han, 2011; Hanriot, 2016). From the legal perspective, the Guangzhou Arbitration Commission (hereinafter referred to as "GZAC") states that "e-arbitration is an online dispute

resolution method that provides arbitration services by using network technology resources, such as the internet" (article 1 of the GZAC). In light of the opinions from existing literature, this article has defined e-arbitration as an out-of-court dispute resolution mechanism where all procedures are conducted using electronic means, with parties submitting their dispute to an independent and impartial arbitrator appointed by or for the parties. The arbitrator then renders a binding e-arbitral award that is enforceable either voluntarily or by law.

Furthermore, e-arbitration is seen as a viable alternative to traditional arbitration (Bagnaru, 2013) in that it has the potential of increasing access to justice. This is due to the fact that e-arbitration is more cost efficient, faster, and less formal than traditional arbitration (Labanieh et al., 2022a; Widjaja et al., 2020). However, the e-arbitral award raises a number of legal issues and challenges (Wahab, 2011), which have yet to be fully addressed by arbitration laws in Malaysia, such as the Arbitration Act 2005 (Act 646) (hereinafter referred to as "Act 646") and the I-Arbitration Rules 2021. In other words, the legitimacy of e-arbitral award in Malaysia remains in doubt.

One of the prominent challenges and legal issues associated with e-arbitral award emerges from the fact that it comes in an electronic format (e-format) and contains the arbitrators' digital signature (e-signature), which greatly differs from a traditional arbitral award that comes in paper form and bears the arbitrators' handwritten signatures. Additionally, domestic arbitration laws, exemplified by Act 646 and I-Arbitration Rules 2021, as well as international arbitration laws and conventions, typified by MLICA 1985 and NYC-1958, establish the prerequisites for enforcing traditional arbitral awards. These laws and conventions mandate that the involved parties present either the "authentic original" or a "duly certified copy" of the traditional arbitral award. However, the emergence of e-arbitral award poses a legal quandary, given that the parties involved in arbitration proceedings would lack the means to physically present the e-arbitral award, which inherently comes in an e-format. Consequently, they would face difficulties in fulfilling the requirement of originality.

As a result, the Malaysian government should make greater efforts to establish e-arbitration (Labanieh et al., 2022b), particularly as traditional arbitration is not without its flaws and challenges (Labanieh

et al., 2019). For instance, Rashid (2008) highlighted that to date, both arbitration and litigation share similarities in terms of cost, duration, technical complexities, and uncertainties. In fact, arbitration may surpass litigation in both cost and duration (Rashid, 2008).

Based on the above arguments, this article aims to examine the following three crucial points: (1) the legitimacy of e-arbitral award for e-arbitration purposes in Malaysia; (2) the recognition and enforcement of e-arbitral award in e-arbitration; and (3) the practical implementation of e-arbitral award in Malaysia.

It is hoped that the findings will be able to make significant contributions regarding legal development in Malaysia by demonstrating that the national laws, including the current arbitration laws, are sufficient and well-developed to legalise an e-arbitral award. It will also provide the relevant Malaysian authorities with a set of amendments to directly regulate the e-arbitral award. This will ultimately enhance the legal certainty in establishing e-arbitration and ensure the protection of the interests and rights of all parties involved. Finally, this article is a significant contribution to the current literature on the issue of e-arbitration within the Malaysian context.

METHODOLOGY

This article has adopted a doctrinal methodology that relied on the library as the main source of data collection (Ayub, 2021). Specifically, primary data were collected from several legal sources, such as Acts, international conventions and laws, and decided cases to analyse relevant legislations pertaining to traditional arbitration and e-arbitration. *Secondary data were also gathered from credible sources, such as articles and books. Finally, both types of data were examined using critical and analytical approaches.*

THE LEGITIMACY OF E-ARBITRAL AWARD IN MALAYSIAN E-ARBITRATION

The ultimate phase of traditional arbitral proceedings entails the creation of an award by the arbitral members. The New York

Convention 1958 (hereinafter referred to as "NYC-1958") does not encompass any specific provision that defines a traditional arbitral award. In Malaysia, traditional arbitral award is a "ruling made by the arbitral tribunal concerning the substance of the dispute, which includes any final, partial, or interim award, and any award on interest or costs, but it does not encompass interlocutory orders" (Act 646, section 2 (1)). In the context of e-arbitration, an e-arbitral award can be defined as any final, binding preliminary, temporary, or partial award issued electronically by the arbitral members.

The following discussion delves into various legal issues related to the legitimacy of e-arbitral awards in e-arbitration in Malaysia. This encompasses the different types of e-arbitral award in e-arbitration, the contents and formal requirements of a valid e-arbitral award in e-arbitration, the validity of the e-deliberation of an e-arbitral award in e-arbitration, the validity of the e-delivery of an e-arbitral award in e-arbitration, and the determination of the place of arbitration in the e-arbitration.

The Types of E-Arbitral Award in E-Arbitration

Before examining the legitimacy of an e-arbitral award according to Malaysian laws, it is vital to highlight the different types of e-arbitral award used in e-arbitration in order to illustrate the types that fall within the scope of Act 646. There is no doubt that upon agreeing to submit their dispute to arbitration, the parties involved have granted the arbitrators a judicial role (Fouchard & Goldman, 1999). For this reason, traditional arbitration is more appealing than traditional mediation and negotiation because the arbitrators are able to put an end to the dispute before them by issuing a binding and final decision known as an award (Act 646, section 36 (1)). However, this feature does not disregard the parties' right to challenge the traditional arbitral award in the Malaysian High Court based on procedural and jurisdictional grounds (Act 646, sections 37 and 39)).

In the context of this article, the arbitrator's decision in e-arbitration is not always binding because the e-arbitral award may encompass any of the following three types of statutory constraint: binding, non-binding, or unilaterally binding. When the e-arbitral award is binding, the process should be classified as a true arbitration because

the arbitrator's decision is similar to the national judge's judgment (Badiei, 2015). Simply put, in a binding e-arbitration, the e-arbitral award is binding and final and the national enforcing court can only null it in very limited circumstances (Valerievich, 2017).

Meanwhile, the e-arbitral award in a unilaterally binding e-arbitration will only bind one of the parties. In the example of Business-to-Consumer (B2C) disputes, the Business will only be bounded by the e-arbitral award while the Consumer still has a right to submit his/her dispute to the national court if he/she does not accept the e-arbitral award issued by the arbitral tribunal.

On the other hand, the e-arbitral award in a non-binding e-arbitration can be rejected and accepted by any of the disputing parties. This means that the non-binding e-arbitration allows any of the disputing parties to reject the arbitrator's decision and seek further redress in the national court. This will lead to two results: (1) the non-binding e-arbitration offers non-enforceable e-arbitral award, and (2) the arbitrator does not have a binding role, however, his/her role is only embodied in helping the parties to evaluate their views and arguments (the same role as a mediator). In this regard, the non-binding arbitration is seen as less effective (Schultz, 2011). An example of a non-binding e-arbitral award can be seen in article 4 (k) of the Uniform Dispute Resolution Policy (UDRP), which states that:

> "The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded."

In Malaysia, section 36 (1) of Act 646 states that the traditional arbitral award is final and binding on the parties. It stands as a clear indication that Act 646 does not recognise non-binding or unilateral arbitral awards. Therefore, prospective e-arbitration systems should enable the arbitrator to issue a binding and final e-arbitral award. This is because the binding e-arbitral award will provide prompt access to remedies without the need to resort to the national court, and that the binding e-arbitral award is in line with Act 646.

The Contents and Formal Requirements of a Valid E-Arbitral Award in E-Arbitration

The main function of the arbitral members is to decide the dispute before them by issuing an arbitral award (Greenberg et al., 2012). Regarding the contents of traditional arbitral award, section 33 (3) of Act 646 states that a traditional arbitral award should contain the reasons upon which it was based. It should also state the date of issuance and the place of arbitration (Act 646, section 33 (4)). Additionally, a traditional arbitral award must include the majority of the arbitrators' signatures (only if the arbitral tribunal contains three arbitrators and more) and the reason for the absence of other signatures (Act 646, section 33 (2)). The same applies in the context of I-Arbitration Rules 2021 because a traditional arbitral award should include the same contents mentioned earlier (I-Arbitration Rules 2021, Part I, articles 34 (3) and (6)). In the context of e-arbitration, the e-arbitral award should comprise the same contents as the traditional arbitral award (Chakraborty, 2020).

It is also imperative to highlight that the formal prerequisites for a valid traditional arbitral award are regulated by the law of arbitration, specifically Act 646. As specified in section 31 (1) of Act 646, traditional arbitral award must be in writing, in paper form, and bear the handwritten signatures of the arbitrators. However, the formal prerequisites for a valid e-arbitral award differ from those of a traditional arbitral award, since e-arbitral awards are issued online, in electronic/digital format, and contained the arbitrators' e-signatures (Wahab, 2011). This raises a concern over the following two critical questions: (1) whether the electronic/digital form of the arbitral award fulfils the "in writing" requirement stipulated by Act 646 and I-Arbitration Rules 2021; and (2) whether the arbitrators' e-signatures on the e-arbitral award meet the "hand-written" signature requirement specified in Act 646 and I-Arbitration Rules 2021.

Aside from the aforementioned points, several traditional arbitration laws have acknowledged the validity of an electronic/digital form of the arbitral award, commonly referred to as "electronically written" (English Arbitration Act 1996, article 52 (1); Switzerland-Federal Code on Private International Law 1987, article 189 (1); and Dutch Code of Civil Procedure 2015, article 1072b (3)). In the context of this article, addressing the first issue mentioned above necessitates

the examination of other pertinent laws in Malaysia, including the Electronic Commerce Act 2006 (Act 658) (hereinafter referred to as "Act 658") and the Evidence Act 1950 (hereinafter referred to as "Act 56").

Even though certain Acts in Malaysia, such as Act 658 and Act 56, are not applicable to arbitration (section 2 of Act 56; section 2 (1) of Act 658), they still carry pertinent importance in demonstrating that Malaysia is on par with other countries in terms of legalising e-writing and electronic evidence in the legal sphere. This is a testament to Malaysia's commitment to keep up with the latest advancements in legal technology and strive towards a modern and efficient legal framework.

In particular, section 3 of Act 56 provides a comprehensive definition of the term "document", which encompasses "any matter recorded, stored, processed, retrieved, or produced by a computer". This indicates that an e-arbitral award created and stored on a computer is still considered as electronic evidence. Additionally, Act 658 defines an "electronic message" as any information sent, generated, stored, or received through electronic means, while the term "electronic" is defined as the application of optical, electrical, electromagnetic, magnetic, photonic, biometric, or comparable technologies (Act 658, section 5). Furthermore, section 8 of Act 658 recognises e-writing by stating that in instances where a legal provision mandates information to be in written form, such requirement is satisfied if the information is conveyed through an "electronic message" that is both understandable and accessible for later use.

Based on the above sections of Act 658, it is clear 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 and current electronic communications, such as e-mail, but also to accommodate future technological developments. It is apparent that section 8 of Act 658 confirms that the obligation of being "in writing" is fulfilled if the data within the electronic message, like in an e-arbitral award, is accessible and comprehensible for future reference. By invoking section 8 of Act 658, it can thus be contended that in principle, an e-arbitral award, which is presented in electronic/digital form, meets the "in writing" prerequisite stipulated in Act 646. However, there is

still a need to introduce further measures to directly legalise e-arbitral awards. A new section could be added into Act 646 to give legal power to an e-arbitral award. Additionally, an amendment is suggested to the first sentence in section 31 (1) of Act 646 as follows: "an arbitral award may come in any form. When an arbitral award comes in electronic/ digital form, its content shall be accessible so as to be usable for subsequent reference". Such an amendment aims to eliminate the non-admissibility risk of an e-arbitral award and provides flexibility to the arbitrators because it uses the word "may". This means that arbitrators have the right to render the arbitral award in any form, either via the traditional *"paper form"* or electronic/digital form.

Another solution is by amending Act 658 to accept electronic messages not only in commercial transactions as stated in section 2 (1) of Act 658, but also in arbitration, especially in the process of producing an arbitral award in electronic form (issuing of the e-arbitral award). This will ensure that Act 646 is up-to-date and equipped to handle the growing use of technology in the arbitration sector. By taking this step, Malaysia can continue to be at the forefront of using technology in the legal sphere, providing a more efficient and accessible process for those seeking resolution through arbitration.

In the context of I-Arbitration Rules 2021, the Asian International Arbitration Centre (AIAC) on 1 November 2021, introduced a new Islamic arbitration framework for parties to use in disputes that are based on Shariah principles. The framework, named the AIAC I-Arbitration Rules 2021 (Islamic Arbitration), is meant to support and increase the popularity of Islamic arbitration, particularly within the rapidly expanding global Islamic financial sector. However, it should be noted that the AIAC i-Arbitration Rules 2021 (Islamic Arbitration) does not prevent the use of other types of commercial contracts in Islamic transactions, including those used in Halal industries (I-Arbitration ("Islamic Arbitration"), 2023).

This subsequently refers back to the initial question about the admissibility of an arbitration award, which comes in electronic/ digital form according to the *I-Arbitration Rules 2021. Rule 2.4 of the I-Arbitration Rules 2021 defined "Communication" as "any written notice, correspondence, pleading, witness statement, expert report, ruling, opinion, submission, or other document delivered during the course of the arbitral proceedings, including a Procedural Order."*

Additionally, rule 3.1 of the I-Arbitration Rules 2021 provides flexibility in terms of the methods by which parties can communicate with one another. By allowing communications to be delivered through various mediums such as hand delivery, registered post, courier service, electronic means (including email and facsimile), or any other appropriate means that provides a record of its delivery, the AIAC i-Arbitration Rules ensure that parties have multiple options to effectively and securely communicate with each other during the arbitration process. In short, it has legalised the communication by ruling "such as arbitral award" in any form of electronic means. This means that producing the arbitral award in electronic/digital form will be legally valid, unlike Act 646. It states that:

> *"For the purposes of the AIAC i-Arbitration Rules, any Communication may be delivered by hand, registered post or courier service, or transmitted by any form of electronic means, including electronic mail and facsimile, or delivered by any other appropriate means that provides a record of its delivery, unless otherwise agreed to by the Parties or directed by the Arbitral Tribunal."*

Concerning the second issue, it should be noted that several e-arbitration laws, including some traditional arbitration laws, have recognised the arbitrators' e-signatures on the arbitral award (Guangzhou Arbitration Commission–Network Arbitration Rules 2018, article 27 (1); Russian Arbitration Association–Online Arbitration Rules 2015, article 5.1.4; Bulgarian Chamber of Arbitration and Mediation–Rules of the Court of Arbitration 2015, article 52 (3); and Dutch Code of Civil Procedure 2015, article 1072b (3)).

In the context of this article, it is noteworthy to highlight that Act 646 still mandates the inclusion of traditional "hand-written" arbitrators' signatures on the arbitration award in paper form (Act 646, section 33 (1)). In contrast, Rule 34 (6) of the I-Arbitration Rules 2021 permits arbitrators to sign the award either physically or electronically. However, Malaysia has been progressing towards acknowledging the e-award without any explicit indication to e-arbitration. It includes the decision to acknowledge digital signatures since 1997 through the enactment of the Digital Signature Act 1997 (hereinafter referred to as "Act 562"). Section 2 (1) of Act 562 defines the digital signature as a procedure involving an asymmetric cryptosystem wherein a message

transforms or changes. This transformation is achieved in a manner that authorises an individual possessing both the "original message" and the "public key of the entity" who performed the transformation (referred to as the "signer") to ascertain two key aspects effectively. First, the individual could accurately determine whether the transformation was developed and generated by utilising the private key that corresponds precisely to the public key belonging to the signer. Second, the individual could determine whether any changes or modifications have been introduced to the message before the initial transformation was performed and executed. Specifically, Section 2 (1) of Act 562 defines a digital signature as follows:

> "A transformation of a message using an asymmetric cryptosystem such that a person having the initial message and the signer's public key can accurately determine (a) whether the transformation was created using the private key that corresponds to the signer's public key; and (b) whether the message has been altered since the transformation was made."

Meanwhile, section 2 (1) of Act 562 covers only the digital signature without discussing other types of e-signatures. Moreover, Act 562 determines the legal criteria for a valid digital signature (Act 562, section 62 (1)). It also grants a document contained and signed with a digital signature the same legal and binding power as the document signed with a hand-written signature, an affixed thumbprint or any other mark (Act 562, section 62 (2) (a)). Furthermore, Act 562 does not undermine the validity of any symbol to function as a signature under any other relevant law in Malaysia (Act 562, section 62 (3)). This means that Act 562 will not disregard the legitimacy of an e-signature under Act 658. Malaysia has also recognised the concept of the e-signature through the enactment of Act 658. Part 1 (5) of Act 658 defines the e-signature as "any letter, character, number, sound, or any other symbol or any combination thereof created in an electronic form adopted by a person as a signature."

From the definition above, it is apparent that Act 658 is comprehensive as it covers several types of e-signatures, unlike Act 562. Furthermore, Act 658 stipulates that electronic signatures should carry an equivalent legal weight as handwritten signatures, on the condition that certain prerequisites are satisfied (Act 658, sections 9 (1) and (2)). These

requirements include the proper identification of the signatory and an explicit indication of their endorsement of the associated information.

Drawing on the preceding information and reasoning, it appears that there are no legal impediments impinging on the validity of an e-arbitral award bearing electronic or digital signatures from the arbitrators, provided that the e-signatures and digital signatures comply with the specifications stipulated in section 9 of Act 658 and section 62 (1) of Act 562, correspondingly. Therefore, the e-arbitral award fulfils the formal requirements of the traditional arbitral award (traditional writing and signature) because Malaysian laws have recognised e-writing, e-signature, and digital signature. This gives both e-writing and e-signature/digital signature the same legal power as the traditional writing and hand-written signature.

Ultimately, it is important to note that in the common law system, the national judge still has discretionary power when he/she wants to rule on matters relating to traditional arbitral processes, including the recognition and enforcement of the traditional arbitral award (Amro, 2014). Conversely, a risk remains that the Malaysian national judge might not invoke Act 658 or Act 562 to decide on the admissibility of e-arbitral award. Avoiding this legal problem requires an amendment of Act 646 in order to fulfil the legal requirements for establishing e-arbitration in Malaysia, thus accepting the arbitral award that has been signed digitally or electronically. The suggested amendment to the second sentence in section 31 (1) of Act 646 could follow these words "an arbitral award may be digitally signed by the arbitrators, provided that the digital signature shall comply with section 62 of Act 562". Such amendment aims to provide flexibility to the arbitrators because it uses the word "may". This means that arbitrators have the right to sign the arbitral award either traditionally "hand-written signature" or digitally.

Validity of the E-Deliberation of an E-Arbitral Award in E-Arbitration

After all submissions are completed, the arbitral tribunal will begin deliberation to reach a decision and make a traditional arbitral award (Born, 2012). In the context of this article, arbitrators conduct deliberation remotely and electronically by using several electronic means, such as e-mail or video conferencing (Wahab & Katsh, 2018). Therefore, the aim of this article is to analyse whether it is valid to

conduct the deliberation electronically according to Act 646 and I-Arbitration Rules 2021.

Without going into details, several traditional arbitration laws enable arbitrators to conduct the deliberation electronically. For instance, article 837 of the Italian Code of Civil Procedure 1994 states that arbitrators must deliberate and reach a decision on the award through a majority vote, either by meeting in person or via video conference, unless the parties have agreed otherwise. The decision must then be recorded in writing.

In Malaysia, Act 646 *does not specify the form of the deliberation and* how the arbitrators should conduct the deliberation, unlike the *I-Arbitration Rules 2021. For instance, under rule 2.4, I-Arbitration Rules 2021 "virtually" has been defined as " the use of technology to remotely participate in the arbitral proceedings, including attending or appearing at meetings, conferences, deliberations, or hearings by using a video conferencing platform, telephone, or any other appropriate means." On the other hand,* e-deliberation is valid according to Act 646 *because* section 22 (3) of *this Act* allows the arbitral tribunal to meet at any place that it considers appropriate for consultation among its members, unless otherwise agreed by the parties. In this view, the arbitral members in accordance with Act 646 may agree to meet over the Internet for the purpose of deliberation; they need to use electronic means to conduct the deliberation. Furthermore, deliberation in traditional arbitration should be confidential and private (Born, 2012). Therefore, if the arbitral members decide to conduct the deliberation electronically, they should agree on adopting several protection measures to ensure confidentiality during the e-deliberation and avoid the risk of interception.

In light of the above concerns, it is argued that to ensure credibility in establishing e-arbitration, Act 646 should regulate the e-deliberation and provide guidelines to guarantee confidentiality during the e-deliberation.

Validity of the E-Delivery of an E-Arbitral Award in E-Arbitration

The arbitration award is akin to a court decision or judgment and the parties must receive sufficient information in enabling them to take

appropriate measures in the event of any ambiguity (Act 646, section 35). In e-arbitration, the e-arbitral award is transmitted electronically, either through e-mail or by posting it on the e-arbitration platform (Russian Arbitration Association-Online Arbitration Rules 2015, article 5.1.5; article 13 (1) of Additional Procedures for On-Line Arbitration 2004).

In Malaysia, Act 646 does not recognise the e-delivery of an arbitral award. This is in contrast to rule 3.1 of the I-Arbitration Rules 2021, which allows the communication or delivery of the arbitral award to take place electronically, as explained earlier. Rule 3.1 states that:

> "For the purposes of the AIAC i-Arbitration Rules, any Communication may be delivered by hand, registered post or courier service, or transmitted by any form of electronic means, including electronic mail and facsimile, or delivered by any other appropriate means that provides a record of its delivery, unless otherwise agreed to by the Parties or directed by the Arbitral Tribunal."

However, the language used in section 33 (5) of *Act 646* shows that the delivery of an award should be made in traditional ways, such as by courier. However, the e-delivery of the arbitral award is valid according to Act 646, especially when sections 22 (1) and (2) of *Act 646* are invoked.

In particular, section 21 (1) of Act 646 recognised the principle of party autonomy. This implies that parties have the liberty to choose or customise the procedural rules to meet their specific requirements and preferences. For example, the parties can come to an agreement to employ electronic means like e-mail for the purpose of delivery. Additionally, section 21 (2) of Act 646 empowers the arbitral members with considerable discretion to conduct the arbitration in a manner they deem appropriate, provided that the parties have not previously agreed on a method for conducting the arbitral proceedings. In simple words, the arbitral members could agree on using any type of electronic means for the purpose of delivery.

Furthermore, it is important to mention that the electronic means used for the purpose of delivery should achieve the functions of the

traditional method of delivery. For example, they should be able to show the date of delivery/receipt and maintain the integrity of the information. As a final point, there is an argument that to facilitate the implementation of e-arbitration, Malaysian lawmakers should legalise e-delivery. This can be accomplished by amending section 33 (5) of Act 646.

The Determination of the Place of Arbitration in E-Arbitration

The concepts of "seat of arbitration" and "place of arbitration" are often used interchangeably and considered synonymous. For the purpose of this article, "place of arbitration" will be utilised as the primary term. The place of arbitration is not a physical location but rather a legal concept (Rajoo, 2017). It refers to the jurisdiction where arbitration is considered to have its legal headquarters or domicile (Born, 2012). In Malaysia, section 33 (4) of Act 646 indicates that a traditional arbitration award is considered to have been made at the place of arbitration, regardless of where the arbitrators signed it. Therefore, the arbitrators are not required to be present in Malaysia when signing the award (Rajoo, 2017). The place of arbitration holds significant importance as it establishes the legal framework that governs the arbitration proceedings, including the rules and protocols for conducting the arbitration, the enforcement of awards, and the recognition and enforcement of the arbitral agreement. It is vital to indicate that the place of arbitration should not be confused with the venue where hearings and meetings are held (ADR Institute of Canada-Arbitration Rules 2016, rule 1.2). In Malaysia, both Act 646 and I-Arbitration Rules 2021 make a clear distinction between the venue of hearings and meetings, and the place of arbitration (section 22 (3) of Act 646, rule 14 (3) of I-Arbitration Rules 2021).

Under Act 646, the parties involved in traditional arbitration have the freedom to choose the place of arbitration (per section 22 (1) of Act 646). However, if the parties are unable to agree on the place, the arbitral tribunal will make a decision based on the specific circumstances of the case, including the parties' convenience (as outlined in section 22 (2) of Act 646). A similar approach is taken in the I-Arbitration Rules 2021, where the parties have complete control over determining the place of arbitration (Rule 14 (1) of the I-Arbitration Rules 2021). However, if the parties are unable to reach a decision, the default

place is Kuala Lumpur, Malaysia, unless the arbitral tribunal selects a different place after taking the circumstances of the case into account (Rule 14 (2) of the I-Arbitration Rules 2021). These provisions demonstrate the significance of the place of arbitration in both Act 646 and the I-Arbitration Rules 2021 as it allows the parties or the arbitral tribunal, in case of failure by the parties to make a decision, to have full autonomy in selecting the place.

In the context of e-arbitration, certain difficulties may arise in determining the place of arbitration (Deskoski et al., 2021). This is because e-arbitration takes place in a virtual environment and the parties involved have neglected to establish the place of arbitration. Therefore, it is crucial to explore the methods for determining the place of arbitration in e-arbitration, particularly due to the fact that the place of arbitration does not lose its importance in e-arbitration (Kadioğlu, 2019). Several scholars have suggested that the place of the online service provider should be considered as the place of arbitration in e-arbitration (Kadioğlu, 2019); nevertheless, such view has been criticised as it ignores the fact that multiple servers may be involved in e-arbitration processes and located in different places (Vora, 2013; Wang, 2018). On the other hand, Lynch argues that e-arbitration is conducted electronically and should be considered a "denationalised or floating process" that is not subject to the imposed control of the law on the place of arbitration (Lynch, 2003). However, Lynch's argument has been rejected in countries that adopt MLICA, such as Malaysia. For example, section 39 (1) (a) (vii) of Act 646 in Malaysia allows the Malaysian High Court to reject the enforcement of a traditional arbitration award if the relevant party can demonstrate that it has been set aside or suspended by a court in the country where the award was made (i.e., the place of arbitration).

Despite the differing opinions, the legitimacy of e-arbitration still stems from the traditional arbitration laws (Yüksel, 2007) that put emphasis on the significance of the place of arbitration. Besides, the virtual nature of e-arbitration does not make a substantial difference in regard to the place of arbitration when compared to traditional arbitration (Zheng, 2017). In light of these facts, it is imperative for the parties or arbitrators involved in e-arbitration to determine a place, which can be done using the traditional methods outlined in Act 646 or I-Arbitration Rules 2021.

THE RECOGNITION AND ENFORCEMENT OF THE E-ARBITRAL AWARD IN E-ARBITRATION

The following section examines the required documents for recognising and enforcing the traditional arbitral award in Malaysia. It also explores the conventional approach for enforcing e-arbitral award under Act 646. *Finally, it scrutinises the* self-enforcement mechanisms for enforcing e-arbitral award in e-arbitration.

Required Documents for Recognising and Enforcing the Traditional Arbitral Award in Malaysia

In traditional arbitration, a primary issue in any endeavour to acquire recognition and enforcement of the traditional arbitral award is to demonstrate its existence (Rhea, 2017). Before delving into further details of the required documents for enforcing the e-arbitral award according to Act 646, it is essential to shed light upon the approaches followed by other national arbitration laws. To illustrate, article IV (1) of the NYC-1958 is a good starting reference point.

Primarily, the formalities required for obtaining recognition and enforcement of a traditional arbitral award to which the NYC-1958 applies are minimal and simple (Mistelis, 2015). Article IV (1) of the NYC-1958 provides that in order to secure the recognition and enforcement of the arbitral award, the party initiating the request for recognition and enforcement is required during the submission of the application, to provide the following documentation. First, the original arbitral award is appropriately verified through authentication, or a duly attested duplicate of the said original award. Second, the original arbitral agreement as referred to in article II, or a properly verified duplicate of the aforementioned original agreement. It states that:

> "To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof; (b) The original agreement referred to in article II or a duly certified copy thereof."

In light of the above, some arbitration laws follow a more rigorous approach than article IV (1) of the NYC-1958 (they required additional

documents to what was indicated in article IV (1)). For instance, article 54 of the Syrian Arbitration Act No.4 of 2008 requires the party who seeks judicial assistance for enforcing the traditional arbitral award to provide a copy of the minutes as evidence of the delivery of the award pursuant to article (43). Similarly, article 48 of the Republic of China Arbitration Law 1998 requires the applicant to provide "the full text of the foreign arbitration law and regulation, the rules of the foreign arbitration institution, or the rules of the international arbitration institution, which applied to the foreign arbitral award."

However, other national arbitration laws follow a less rigorous approach than article IV (1) of the NYC-1958. For instance, under Article 46 (2) of the Japanese Arbitration Law 2003, the successful party is not obligated to provide the original or certified copy of the arbitration agreement to enforce the arbitration award. Besides, article 45 of the Norway Arbitration Act 2005 requires the original award or a certified copy, without the arbitral agreement. Furthermore, Article 38 (2) of the Danish Arbitration Act 2005 mandates that the petitioner seeking recognition and enforcement must present a certified copy of the traditional arbitral award. However, the submission of the arbitration agreement is only mandatory if it is in written form.

In contrast, other national arbitration laws follow exactly article IV (1) of the NYC-1958. For instance, one may argue that the approach followed by section 38 (2) of Act 646 does not put any additional burden on the applicant, especially when compared with the national arbitration laws following a more rigorous approach than Article IV (1) of NYC-1958. However, it is argued that although Act 646 was modelled in 2018 to be in line with the UNCITRAL Model Law on International Commercial Arbitration 1985 (hereinafter referred to as "MLICA 1985"), section 38 (2) of this Act contradicts section 35 (2) of MLICA 1985 because the latter reduces the required documents for enforcing the award. It emphasises the necessity of providing only the original conventional arbitration award or a copy of it. This makes the enforcement processes less bureaucratic and potentially less expensive and burdensome.

It is also significant to note that there is no legal problem facing the national arbitration laws that adopt a less rigorous approach than article IV (1) of NYC-1958. This is because article VII (1) of the

NYC-1958 enables the national enforcing court to rely on the "*more-favourable-right provision"*. In particular, the first paragraph of Article VII confers upon the party seeking recognition and enforcement of a conventional arbitration award the privilege of invoking a more favourable domestic law or treaty of the enforcing state. Pursuant to Article VII (1), a Contracting State would not contravene the NYC-1958 by enforcing a conventional arbitral award under more liberal regimes than those provided for by the NYC-1958.

The provision of the more-favourable-right is based on the rationale of the NYC-1958, which aims to streamline the recognition and enforcement of foreign arbitral awards. The provision allows the party seeking recognition and enforcement of a traditional arbitral award to rely on a more favourable domestic law or treaty applied in the enforcing national court, as per article VII (1) of the NYC-1958 (Berg, 2008). Practically, this means that if a domestic law or treaty can ease the recognition and enforcement process, that regime should be relied upon. For instance, the Higher Regional Court of Munich applied the more-favourable-right provision by ruling that the applicant is not required to submit the arbitral agreement under article IV (1) (b) of the NYC-1958, as the domestic German law does not require it (Oberlandesgericht, München, Germany, 34 SCH 31/06, 23 February 2007).

The Traditional Mechanism for Enforcing the E-Arbitral Award According to Act 646

Under Act 646, the term "High Court" refers to the High Court in Malaya and the High Court in Sabah and Sarawak, or either of them, as the case may require. Furthermore, Act 646 does obligate the arbitral tribunal to render the traditional arbitral award within a specified time frame. However, if the time for making the traditional arbitral award was determined in the arbitral agreement, the Malaysian High Court can extend that time, unless otherwise agreed by the parties (Act 646, section 46 (1)). Additionally, Act 646 establishes that the Malaysian High Court is accountable for various duties, which comprise the recognition and enforcement of awards.

Section 38 of Act 646 outlines the steps for recognising and enforcing both domestic and foreign traditional arbitral awards. Notably, under

section 38 (2) of Act 646, "the party seeking to enforce their traditional arbitral award is required to provide either a duly authenticated original award or a duly certified copy of the award, as well as the original arbitration agreement or a duly certified copy thereof." In addition, "if the traditional arbitral agreement or award is not in the Malay or English language, the applicant must supply a duly certified translation of the agreement or award in English" (Act 646, section 38 (3)).

In the context of this article, the meanings of the terms "copy" and "original" become ambiguous in an electronic setting (Ortiz, 2005). This is because digital data, such as e-files or e-documents, can be replicated in countless identical copies (Sastry, 2020). Therefore, it is crucial to examine whether an e-document or file, such as an e-award, meets the criteria for being considered an "original".

For this to be achieved, it is important to invoke Act 658 because it can provide a legal solution to meet the prerequisite of an "original". Again, Act 658 defines electronic message as information generated, sent, received, or stored by electronic means (Act 658, section 5). Section 12 of Act 658 stated that when the document needs to exist in a "primary physical format", the legal stipulation can be met by a document presented in the "electronic message format," provided that the following requirements are satisfied. First, there is a reliable guarantee regarding the unaltered state of the information enclosed within the electronic message, commencing from its initial creation to its ultimate version. Second, the electronic message is both comprehensible and accessible to the extent that it can be utilised for future reference or consultation.

In short, it provides that a document transmitted electronically, such as an e-message, can be considered an original document. Precisely, section 12 (1) states that:

> "Where any law requires any document to be in its original form, the requirement of the law is fulfilled by a document in the form of an electronic message if (a) there exists a reliable assurance as to the integrity of the information contained in the electronic message from the time it is first generated in its final form, and (b) the electronic message is accessible and intelligible so as to be usable for subsequent reference."

Furthermore, section 12 (2) of Act 658 mentioned that the assessment of the integrity of the information within the document would be determined based on two main conditions. First, whether the information has remained unchanged and whole, excluding for any endorsements or modifications or changes that occur during the regular processes of storage, communication, and display. Second, the degree of dependability and reliability needed for the assessment is demarcated by considering the purpose for which the document was originally created and by taking into account all pertinent and relevant circumstances that surround the document. Section 12 (2) of Act 658 stipulates that:

> "For the purposes of paragraph (1) (a); (a) the criteria for assessing the integrity of the information shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement or any change which arises in the normal course of communication, storage and display; and (b) the standard of reliability required shall be assessed in the light of the purpose for which the document was generated and in the light of all other relevant circumstances."

Drawing from the preceding sections, it becomes evident that e-arbitral agreement or e-arbitral award can qualify as an "original" only if it satisfies the standards outlined in section 12 of Act 658. Specifically, the e-file/document, including e-arbitral agreement or e-arbitral award, must retain the authenticity of its data, prevent unwarranted alteration or modification, and remain accessible and understandable to facilitate subsequent reference.

Another solution to avoid the refusal of e-arbitral award is by applying the traditional approach that encourages the arbitrator to prepare the e-arbitral award in a paper form and sign it traditionally. Several e-arbitration laws have adopted this solution. For example, article 13 (2) of the Additional Procedures for Online Arbitration 2004 mentioned that upon submission of a request by one of the involved parties, the Arbitration Court is bound to produce a written arbitral award. In this written arbitral award, the signature of the Secretary serves to confirm both the genuineness of the document itself and the signature of the arbitrator. It states that;

> "Upon application of a party the Arbitration Court shall render the arbitral award in writing as well. The signature of the Secretary on the arbitral award in writing shall verify its authenticity as well as the signature of the arbitrator."

Despite the aforementioned points and reasoning, it is suggested that Malaysian legislators should revise and update section 38 (2) of Act 646. This would help in promoting e-arbitration.

Self-Enforcement Mechanisms for Enforcing the E-Arbitral Award in E-Arbitration

The outcomes of ODR can be enforced by employing self-enforcement mechanisms that aim to enhance the likelihood of voluntary adherence, and facilitate the enforcement of the decision if voluntary compliance is not achieved (Patrikios, 2008). These mechanisms are divided into the following two types: (1) direct self-enforcement mechanisms, such as Chargeback System, Escrow System, or Technical Control, and (2) indirect self-enforcement mechanisms, such as Rating or Trustmark. The following section briefly discusses the direct and indirect self-enforcement mechanisms.

Direct Self-Enforcement Mechanisms

The direct self-enforcement mechanisms aim to provide automatic enforcement of the dispute's outcome (UNCITRAL Document: A/CN.9/WG.III/WP.124, 2015). When it comes to technical control, the Uniform Domain Name Dispute Resolution Policy (UDRP) procedures for resolving domain name disputes serve as a notable example. However, this is a unique situation where the Internet Corporation of Assigned Names and Numbers (ICANN) holds authority over domain names and possesses the ability to compel registrants to transfer or cancel domain names based on the final decision or outcome of the dispute. According to Kohler:

> "Ten days after the decision by the panel of experts, the domain name is either cancelled or transferred to the winning party, depending on the panel's decision and provided the loser has not furnished evidence of having started a court action to challenge the decision. The decision is implemented by the registrar that registered

> the domain name and exercises technical control over the registration (Kohler, 2005, p.454)."

In the Escrow System, a third party retains the funds on a secured account until the products are delivered to the buyer who must confirm that the received products correspond with the descriptions of the sale (Hanriot, 2016). Otherwise, the funds will be transferred to the buyer's account. This mechanism helps to solve the problem of fraudulent sellers.

Concerning the Chargeback System, a buyer can request the reimbursement of funds from the seller under particular conditions, even after he/she has authorised the transaction through a credit card (Hanriot, 2016). In this mechanism, the credit card issuer acts as a third party who arbitrates the dispute between the seller and the buyer (Arsdale, 2015), but it does not engage in the adversarial hearing. Finally, it is worth noting that the chargeback system is applied only to credit card transactions (Hörnle, 2009) but not to debit card, internet banking, and mobile phone payments. However, this restriction is not applied in the United States of America and Colombia because the chargeback system is available across all forms of payments (UNCITRAL Document: A/CN.9/WG.III/WP.134, 2015).

Indirect Self-Enforcement Mechanisms

The indirect self-enforcement mechanisms aim to create incentives for sellers in encouraging them to comply voluntarily with the outcomes of ODR (UNCITRAL Document: A/CN.9/WG.III/WP.134, 2015), such as e-arbitration. The Rating mechanism is based on the buyers' evaluation after an e-commerce transaction is completed (Ortolani, 2015). For example, on the Lazada platform, a buyer can rate the seller's online store upon receiving the ordered product or item. This rating will serve to inform other buyers about the quality of the product. In this mechanism, the seller has no right to remove the buyer's rating from his/her online store.

Meanwhile, the Trustmark mechanism typically takes the form of a logo or seal. It is granted by the ODR providers to online sellers for them to put on their websites. This Trustmark serves to inform buyers that a third party has certified the sellers as trustworthy transaction partners (UNCITRAL Document: A/CN.9/WG.III/WP.134, 2015). Such mechanism aims to increase buyers' confidence and trust in the

sellers. It also urges sellers to collaborate in the process of dispute resolution and comply with its outcome (Hörnle, 2009), otherwise they face the risk of losing their seal (UNCITRAL Document: A/CN.9/WG.III/WP.134, 2015). This will put sellers at a total disadvantage because they will be seen as untrustworthy sellers. Moreover, it is unclear whether the Trustmark's revocation would be a powerful incentive to force sellers to comply with a decision that is found unacceptable. It is also imperative to mention that the main difference between the Trustmark and Rating mechanisms is that the latter is provided by the buyers/customers while the former is granted by either an independent third party or the e-arbitration service provider.

PRACTICAL IMPLICATIONS OF THE E-ARBITRAL AWARD IN MALAYSIA

The following section provides the hypothetical procedures for enforcing the e-arbitral award in Malaysia. It also discusses a tool known as the predictive e-award.

The Hypothetical Procedures for Enforcing the E-Arbitral Award In Malaysia

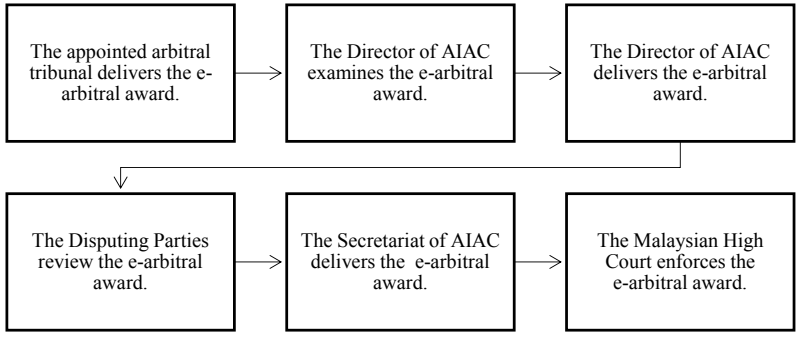
Despite the deep-rooted benefits, e-arbitration has faced a slow growth because of the offline judicial enforcement that affects the purpose of online resolution (Tan, 2019). Even if *Act 646* and I-Arbitration Rules 2021 are amended in the future to regulate e-arbitration, including the e-arbitral award, it may not be sufficient to offer a prompt resolution for prevailing parties who may still have to undergo a lengthy process to enforce their arbitral award.

Furthermore, the e-filing system is only accessible to law firms, lawyers, and agencies (Frequently Asked Questions, 2023a) but not to public litigants who are not represented by lawyers (Lim, 2023). Therefore, an unrepresented winning party who wishes to enforce their arbitral award will still need to appear in person before the Malaysian High Court and file the necessary documents, such as the e-arbitral award, using an e-filing service bureau (Rules of Court 2012, order 63A, rule 1) at the court. This will impose significant costs and burdens on the winning parties.

In conclusion, it is contended that despite Malaysia's establishment of e-courts and amendments to the Rules of Court 2012 to recognise the legality of remote communication technology, it is necessary to establish a centralised e-platform that connects potential e-arbitration platforms with the Malaysian High Court. This is because the existing procedures for enforcing traditional arbitral awards may prove to be impractical and ineffective when applied to e-arbitral awards. To this end, a model is proposed that outlines the steps for enforcing e-arbitral awards through the Asian International Arbitration Centre (AIAC) using a local centralised platform. Figure 1 illustrates each step of the model.

Figure 1

Steps for Enforcing the E-Arbitral Award under the Auspices of AIAC



The steps are as follows:

Step 1. Upon issuing the e-arbitral award, the appointed arbitral members deliver the e-award to the Director of AIAC.

Step 2. The Director of AIAC examines the e-arbitral award to ensure that the appointed arbitral members have considered all the matters submitted by the parties. In this step, the Director of AIAC will not examine the facts of the e-arbitral award.

Step 3. After the approval, the Director of AIAC electronically delivers the e-award to the disputing parties.

Step 4. The disputing parties review the e-arbitral award. If the e-arbitral award contains a mistake or is ambiguous, any of the parties

can refer back to the appointed arbitral tribunal for clarification. However, if the e-arbitral award is clear and correct, the process will move on to the next step.

Step 5. This step comprises two scenarios. First, the losing party will comply voluntarily with the e-arbitral award (this will incur no further issues). Second, the losing party refuses to comply with the e-arbitral award and the winning party will have to initiate enforcement procedures. If the second scenario happens, the Secretariat of AIAC will submit the required documents, such as the e-arbitral award, to the Malaysian High Court through a local centralised e-platform and provide the winning party with a reference number for this submission.

Step 6. The Malaysian High Court enforces the e-arbitral award.

Finally, it is worth noting that the model mentioned above can be applied internationally. This happens when the potential e-arbitration service provider in Malaysia links with other international enforcing Courts in different countries, such as Singapore, China, and England.

The Predictive E-Arbitral Award

The disputing parties to traditional arbitration might always ask their lawyers and arbitrators: "Will I win the case?" or "What is the possibility of winning the case?" One may argue that "mock arbitration" (Rothstein, 2009) can provide practical solutions in this regard (Kaplan & Boltenko, 2015). However, the process of mock arbitration is a waste of time and money (Kessler & Turner, 2023). For this reason, "CaseXplorer Arbitration" (hereinafter referred to as "CXA") has been created through a collaboration between "DecisionQuest" and "American Arbitration Association" (Frequently Asked Questions, 2023b).

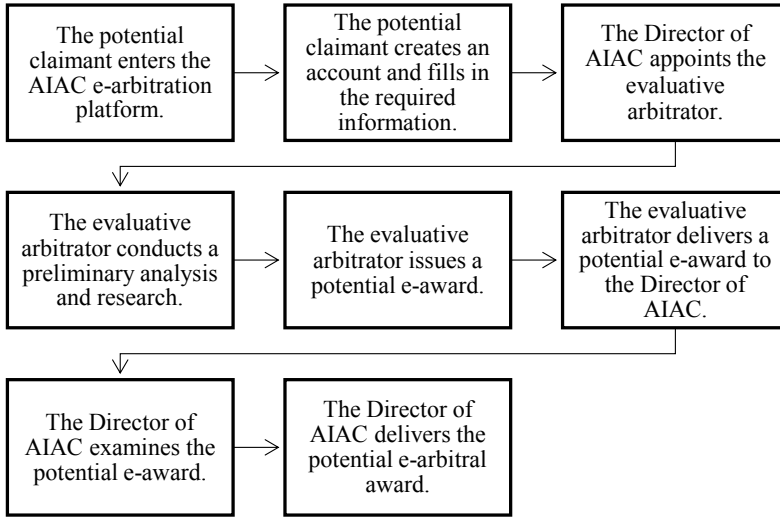
CXA is an online case evaluation tool that allows users, such as in-house counsel or their outside lawyers, to obtain an objective evaluation of their arbitration cases. Users can select three (3) or five (5) experienced arbitrators who are not associated with the actual arbitration dispute and provide them with legal arguments and facts. Within three (3) days, the evaluative arbitrators should provide their responses to the users.

Therefore, this article would like to suggest this tool in the context of e-arbitration because of several reasons. Firstly, the parties to commercial disputes, including Islamic banking disputes, will be able to gain valuable insights into the weaknesses and strengths of their case. Secondly, it will provide the parties to commercial disputes, including Islamic banking disputes, with a preliminary opinion and perception concerning the potential e-arbitral award that will be issued if their dispute is submitted to e-arbitration.

Figure 2 explains the necessary steps for predicting the e-arbitral award by human-arbitrators via the potential e-arbitration platform under the auspices of AIAC.

Figure 2

Steps for Predicting the E-Arbitral Award by Human-Arbitrators via the Potential E-Arbitration Platform under the Auspices of AIAC



The steps are as follows:

Step 1. The potential claimant enters the AIAC e-arbitration platform through a potential website "www.AIAC/e-arbitration.com". He/she then clicks on the icon, labelled as "predictive e-arbitral award".

Step 2. The potential claimant creates an account and fills in the required information of the dispute, such as the type of dispute, the

matters and facts that will constitute a potential dispute between him/her, and the potential respondent(s).

Step 3. The Director of AIAC appoints an evaluative arbitrator who is experienced in the subject matter of the dispute. The number of evaluative arbitrator depends on the complexity of the dispute and the request of the potential claimant.

Step 4. The evaluative arbitrator conducts preliminary analysis and research on the facts and arguments submitted by the potential claimant.

Step 5. The evaluative arbitrator issues a potential e-arbitral award after seven (7) days, starting from the date of his/her appointment.

Step 6. The evaluative arbitrator delivers the potential e-arbitral award to the Director of AIAC.

Step 7. The Director of AIAC examines the potential e-arbitral award to ensure that the evaluative arbitrator has answered all matters and facts submitted by the potential claimant.

Step 8. The Director of AIAC electronically delivers the potential e-arbitral award to the claimant's account. This happens when the potential e-arbitral award covers all the matters and facts submitted by the potential claimant and when the potential claimant pays the required fees.

From a theoretical standpoint, *using Artificial Intelligence (hereinafter referred to as "AI") with e-arbitration will bring several benefits to the participants involved in e-arbitration*. For instance, it can provide the parties and arbitrators with an additional tool that helps promote more effective resolution processes (Amro, 2019). In this regard, the authors advocate the use of AI applications, such as Case-Based Reasoning (CBR), rather than a human-arbitrator to predict the e-arbitral award. CBR is a problem-solving methodology that utilises past experiences and data to inform present choices and decisions (Carneiro et al., 2014). The application can help to predict the potential e-arbitral award that the arbitrator will issue if a commercial dispute, including an Islamic banking dispute, is submitted for e-arbitration. The rationale behind this suggestion is to decrease the time and expense required by human-arbitrators to predict the e-arbitral award. Finally, it should be noted that using AI applications to predict the

outcomes of has disputes has already been applied in litigation. For instance, Bluejlegal is an AI-powered platform that can accurately predict court outcomes (Bluejlegal, 2023). Likewise, Ravel law has created a tool known as "Judge Analytics" that aims to predict outcomes and compare judges (Products and Technology, 2023).

CONCLUSION

Establishing e-arbitration in Malaysia will pave the way for enhancing the current dispute resolution framework with an innovative mechanism that can overcome many challenges facing traditional arbitration. It also has the capacity to increase and facilitate access to justice in Malaysia. Moreover, Malaysian lawmakers have made considerable efforts to regulate the proceedings and activities that take place in the online environment without direct reference to e-arbitration. For example, Act 658 and Act 562 constitute the cornerstone for legalising the e-arbitral award, particularly by giving e-writing and digital/e-signature the same binding and legal power as the use of traditional writing and hand-written signatures. Both Act 646 and I-Arbitration Rules 2021 are, to some extent, considered advanced and modern efforts to legalise the e-deliberation and e-delivery of the e-award. However, it is imperative for Malaysian lawmakers to address several existing legal gaps. For this reason, the authors, through this article, have provided several recommendations that can make a difference once they have been considered and adopted by the relevant authorities in Malaysia.

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CONFLICT OF INTEREST

No potential conflict of interest was reported by the authors.

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