Maritime disputes can become complex when foreign elements are involved, particularly when multiple countries with distinct legal systems are at play. For instance, a ship from Korea collides with another ship from Singapore within Malaysia's territorial waters. In such a scenario, determining the applicable jurisdiction can be challenging, especially when parties disagree on issues such as:

i) whether the dispute should be resolved by way of court proceedings or other alternative dispute resolutions ("**ADR**") such as arbitration;

ii) disagreement in the choice of law that governs the case; or

iii) parties may even have initiated legal proceedings in two different jurisdictions simultaneously, leading to potential parallel proceedings or pre-emptive judgments by one of the jurisdictions involved.

In this article, we will delve into how Private International Law or Conflict of Laws has provided the principles, rules, or approaches necessary to govern these complex issues when foreign elements are involved in a maritime dispute.

Admiralty Jurisdiction

First, we will look at the issue of Jurisdiction. Jurisdiction refers to the power, right or authority of a court to hear and make legal decisions and judgments against a particular matter that was brought before the Court. The Admiralty Jurisdiction of the Malaysian Admiralty Court is conferred by Section 24(b) of the Court of Judicature Act 1964 ("**CJA 1964**")[1], which incorporates Sections 20 to 24 of the UK Senior Courts Act 1981 ("**SCA 1981**").

Under Section 20(2) of the SCA 1981, the Malaysian Admiralty Court has the jurisdiction to

hear and determine the questions and claims including, but not limited to mortgages, collision, salvage service, pilotage and crew wages.[2]

However, having jurisdiction does not automatically mean that the Malaysian Admiralty Court will hear every matter within its jurisdiction. If multiple courts have jurisdiction over the matter in dispute, the Malaysian Admiralty Court may decline jurisdiction under the doctrine of *forum non conveniens*[3], which means allowing the case to be tried in a more suitable and appropriate forum.

Choice of Law

When determining the choice of law in a contract, the common law approach is to apply the three-stage test.[4] First, the court will determine whether the parties have made an express choice of the governing law. A choice of law clause is usually a standard clause in a maritime contract such as a charterparty, bill of sale, or towage agreement and the clauses are usually set out as follows:

"*This Agreement shall be governed by, and construed in accordance with, the law of Malaysia*."

In the absence of an express choice of law, the court will look at whether there is any implied choice of the governing law that can be inferred from the terms or form of the contract or surrounding circumstances.[5] Thirdly, if there is no implied choice of law found, then the court will adopt the system of law with which the transaction has the closest and most real connection to.[6]

On the other hand, in situations where there are no contractual obligations between the parties in a dispute, the general rule that applies in determining the choice of law is the rule of double actionability. This rule essentially states that a tort that has been allegedly committed in a foreign jurisdiction can only prevail in a domestic court if it would be considered legally actionable under the laws of both the home jurisdiction and the foreign jurisdiction.[7]

Conflict of Laws in Arbitration

Dicey, Morris & Collins on the Conflict of Laws define "conflict of laws" as, '*that part of the law... which deals with cases having a "foreign element". By a "foreign element" is simply meant a contact with some system of law other than [Malaysian] law'*.[8]

Conflict of laws issues may commonly arise in arbitrations relating to:

(a) the law governing the capacity of the parties to enter into an arbitration agreement;

(b) the law governing the arbitration agreement and the performance of that agreement;

(c) the law of the seat of the arbitration;

(d) the substantive law of the matters in dispute arising from a defined legal relationship, whether contractual or not; and

(e) the law governing recognition and enforcement of the arbitral award.[9]

In the case of arbitration, the law is similar. The foundation of modern international arbitration is the parties' consent and intent to resolve their disputes through arbitration, as evidenced in their arbitration agreement.[10]

The powers, duties and jurisdiction of an arbitral tribunal are said to stem from three (3) main sources:

(a) the agreement of the parties;

(b) the law governing the arbitration agreement; and

(c) the law where recognition and enforcement of an award is being sought.[11]

The standard clause usually set out in an arbitration agreement is as follows:

"*Any and all disputes between the parties shall be referred to and finally resolved by arbitration, administered by the Asian International Arbitration Centre ("**AIAC**"), and in accordance with the AIAC Arbitration Rules 2021. The Parties agree that the seat of the arbitration shall be in Malaysia.*"

Seat of Arbitration

The seat of the arbitral tribunal refers to the legal jurisdiction governing the arbitration proceedings, rather than simply denoting a physical location or venue where hearings take place. The choice of seat of arbitration has always been important in international arbitration.[12] The Federal Court case of *Masenang Sdn. Bhd. v Sabanilam Enterprise Sdn. Bhd.*[13] shows that it is important for parties to specify in their Malaysian-seated arbitration agreement on a local state or city in Malaysia is the seat of arbitration.

In this case, the issue was whether the High Court of Sabah and Sarawak at Kota Kinabalu ("**HCKK**") has supervisory jurisdiction to hear an application to set aside an arbitration award issued in the High Court of Malaya at Kuala Lumpur ("**HCKL**") as both High Courts have their own respective territorial jurisdictions. It was held that the HCKK's decision to nullify an arbitral award was deemed void and HCKL is the rightful jurisdiction for enforcement of the arbitral award because the arbitration clause provided for Kuala Lumpur as the place of arbitration.

Enforcement of Foreign Judgment/Arbitral Awards

The enforcement and recognition of foreign judgments are governed under the Reciprocal Enforcement of Judgment Act 1958 ("**REJA 1958**"). Pursuant to the REJA 1958, foreign judgment is defined to include judgments or orders given or made by a court in any civil or criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party.

Under the First Schedule of the REJA 1958, the list of the reciprocating countries whose judgments are enforceable in Malaysia are the United Kingdom, Hong Kong, Singapore, New Zealand, the Republic of Sri Lanka, India, and Brunei Darussalam. The foreign judgment of the above-stated countries is enforceable by way of registration with the Malaysian High Court.

A registered foreign judgment would carry the same weight as a judgment that was originally granted by the Malaysian High Court and the judgment will be entered on the date of registration.

Alternatively, foreign judgments that are not within the list of reciprocating countries under the First Schedule of REJA 1958 are required to be enforced through common law. In the case of *PT Sandipala Arthaputra v Muelbauer Technologies Sdn. Bhd*. [2021] MLJU 1063, Choo Kah Sing J has explained the common law rule on enforcement as follows:

> *[9] Foreign judgments obtained in countries other than the countries listed in the First Schedule, have to be enforced through the common law rule. The foreign judgment provides the cause of action itself. In order for the foreign judgment to have the force of law locally, the judgment creditor is required to obtain a local judgment recognizing the foreign judgment in Malaysia. Armed with the local judgment recognising the foreign judgment, the judgment creditor could now enforce the local judgment just like any judgment creditor enforcing a judgment in Malaysia. It is said that "the foreign judgment, if it satisfies the requirement of the common law, is understood to create an obligation, a tie of law, by which the parties are bound and which may be enforced" (see Adrian Briggs, The Conflict of Laws, 4th Ed, Clarendon Law Series, 2019, 131).*

In respect of arbitral awards, Section 39 (1) of the Arbitration Act 2005 sets out the Grounds for Refusing Recognition or Enforcement. However, the Malaysian Court retains the discretion to determine whether an arbitral award should still be enforced once any of the grounds in Section 39 (1) have been established.[14]

Conclusion

In conclusion, the Admiralty Jurisdiction of the Malaysian Admiralty Court plays a vital role in resolving maritime disputes. Understanding jurisdictional boundaries and the choice of law is

crucial in contractual matters, while arbitration agreements necessitate careful consideration of the seat of arbitration. The enforcement of foreign judgments and arbitral awards reflects the ongoing efforts towards legal cooperation. This nuanced legal landscape highlights the importance of clarity and cooperation in navigating maritime legal frameworks, ultimately ensuring fair and effective resolution mechanisms in a globalised context.

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2. Senior Courts Act 1981, s 20(2).
3. Kwong Chiew Ee, Chai Hing Zhou, Daniel Chua Wei Chuen, Aravind Kumarr, and Melvin Ng Yet Ting, Commercial Conflict of Law (Sweet & Maxwell 2022).
4. Sulamerica CIA Nacional De Seguros S.A. and others v Enesa Engenharia S. A and others [2012] EWCA Civ 638.
5. Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb 193 ConLR 87.
6. James Capel (Far East) Ltd v YK Fung Securities Sdn Bhd [1996] 2 MLJ 97.
7. Chan Hak Foon v Sutera Harbour Sdn Bhd & Anor [2008] MLJU 959.
8. Dicey, Morris and Collins on The Conflict of Laws, 15th edn (Sweet & Maxwell 2016] para [1-001].
9. Commercial Conflict of Laws in Malaysia (n 3).
10. "Chapter 1: Overview of International Arbitration" in Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter (eds), Redfern and Hunter on International Arbitration, (6th edition) (Oxford University Press), p 13.
11. "Chapter 5 – Powers, Duties and Jurisdiction of an Arbitral Tribunal" in Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter (eds), Redfern and Hunter on International Arbitration (6th edition) (Oxford University Press) p 305.
12. Commercial Conflict of Laws in Malaysia (n 3).
13. [2021] 8 AMR 97; [2021] 6 MLRA 203.
14. Master Mulia Sdn Bhd v Sigur Ros Sdn Bhd [2020] 7 AMR 757; [2020] 12 MLJ 198 at para [46], FC.

Written by:

Laura Yew Quo Jane
Associate
laurayew@azmilaw.com

Lee Jie Zing
Associate
leejiezing@azmilaw.com

Corporate Communications
Azmi & Associates
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