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ASIAN INTERNATIONAL ARBITRATION CENTRE

UNIVERSITI MALAYA

INTERNATIONAL ARBITRATION COLLOQUIUM 2023: STATE SOVEREIGNTY AND IMMUNITY IN COMMERCIAL ARBITRATION

SPECIAL RAPPORTEUR REPORT

KOLOKIUM TIMBANG TARA ANTARABANGSA 2023: KEDAULATAN DAN KEKEBALAN NEGARA DALAM TIMBANG TARA KOMERSIAL

LAPORAN KHAS RAPPORTEUR

Disclaimer: The views and opinions expressed in this colloquium are those of the speakers and do not necessarily reflect the views or positions of any entities or authorities.

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EXECUTIVE SUMMARY

In February 2022, eight individuals that claimed to be the descendants of the so-called Sultan of Sulu, Jamalul Kiram II, received an award of $14.9 billion against the Government of Malaysia. This is currently the second largest international arbitration case in the world with over 16% of Malaysia's yearly budget now at stake. The Government of Malaysia has taken a strong stand to reject the purported Final Award, and does not recognise its legitimacy and is actively litigating across Europe to ensure that the said award is overturned. The purported Final Award has drawn much global attention to the ongoing international legal battle between the Government of Malaysia and self-proclaimed descendants of the Sulu Sultanate.

The inauguration of the International Arbitration Colloquium 2023 themed "***State Sovereignty and Immunity in Commercial Arbitration***" on 9th May 2023 demonstrates a meaningful and fruitful collaboration between the Legal Affairs Division of the Prime Minister's Department (BHEUU, JPM), the Asian International Arbitration Centre (AIAC), and the Faculty of Law of the Universiti Malaya. Speaking about the hybrid Colloquium, Director of the AIAC, Datuk Sundra Rajoo, said that the AIAC is delighted to be hosting the Colloquium which featured important discussions on state sovereignty and immunity in commercial arbitration. He stressed that the Colloquium has brought upon an ideal avenue for public discourses and dialogues to take place while the Sulu case runs its course.

Akin to the Malaysia Sulu Case website (mysulu-case: https://www.malaysia-sulucase.gov.my/), Dato' Sri Khairul Dzaimee (Director General, Legal Affairs Division of the Prime Minister's Department) explained that this Colloquium served as a perfect medium to disseminate accurate information relating to the Sulu dispute to the domestic and international community. This would, in one way or another, assist the Government of Malaysia to convey the right information in respect of the Sulu case across different jurisdictions.

YB Dato' Sri Azalina Othman Said (the Minister of Law and Institutional Reforms, Malaysia) in her Keynote Address, accentuated that this Colloquium must not be perceived as the Government of Malaysia's response to the ongoing Sulu case. Rather, it was specifically curated to gather the foremost voices of the experts to examine various interesting yet intricate issues brought upon by the Sulu case – ranging from sovereign immunity to the procedural irregularity of the proceeding, including but not limited to the arbitrary movement of the seat of arbitration by Dr. Gonzalo Stampa from Madrid to Paris.

The Minister acknowledged that the Sulu case presented a complex dispute which involved a myriad of fundamental issues that directly affect the arbitration community and stakeholders in the international community, as well as sovereign states. She further spoke about enacting a State Immunity Act to protect the country from any possible foreign claims in future. The Minister emphasised that the pursuits in battling the Sulu claim stand as a testament to Malaysia's commitment to upholding international law as well as preserving the efficacy of the international

arbitration system as the ever-growing global dispute resolution mechanism. The Keynote Address then concluded with a strong assurance that the Malaysian Government will not compromise its sovereignty and stance, as well as that the Sulu Claim will not affect Malaysia's position as a desired venue for foreign investment, especially given the strength of the country's Judiciary and the AIAC.

In essence, the Colloquium featured a great blend of expert discourses encompassing the historical antecedents of the purported Sulu arbitration, the legal and procedural issues involved, the effects of the New York Convention and sovereign Immunity, and the possible abuse of arbitral processes in the Sulu dispute. Truth to be told, the Colloquium would not be made a reality without the insights and wisdom of our panel. With the in-depth analysis and examination of the respective topic, we are confident that the domestic and global community could develop a comprehensive understanding of the narratives as well as the legal and factual twists within the ongoing Sulu dispute.

Last but not least, the AIAC together with the Legal Affairs Division will remain fully committed to spreading awareness and cultivating discourses in respect of the Sulu case through our forthcoming Colloquiums in Sabah and across Europe.

AN OVERVIEW OF THE INTERNATIONAL ARBITRATION COLLOQUIUM 2023: STATE SOVEREIGNTY AND IMMUNITY IN COMMERCIAL ARBITRATION

The Colloquium was set in motion by the first panel discussion entitled "***A Tale Through Time: Navigating the Historical Antecedents of the Purported Sulu Arbitration***". Datuk Sundra Rajoo (Director, Asian International Arbitration Centre) was pleased to be joined by an esteemed panel of speakers, Associate Professor Dr. Bilcher Bala (Associate Professor of Sociopolitic and Cultural of the Malaysian Borneo, Universiti Malaysia Sabah). Mr. Philip Golingai (News Editor, Star Media Group), Professor Dr. Amde Sidik (Chairman, Progressive Institute of Public Policy Analysis, Sabah), and Mr. Shari Jeffri (Historical Researcher). The session started with Mr. Jeffri's in-depth examination of the historical outline of the present Sulu case based on the compilation of 300 years of authentic sources in relation to the Sabah/North Borneo/Brunei's Old Treaties and Documents dated back from 1600 to 1963. It was emphasised that the 1878 Treaty must not be taken as the sole primary source in the present dispute. Rather, it is in Mr. Jeffri's position that a myriad of other evidence, in particular, the primary sources ought to be taken into consideration in assessing the development of the present claim.

Interestingly, Professor Dr. Amde Sidik pointed out that a portion of North Borneo was allegedly granted by then Sultan of Brunei, Sultan Muhyiddin to the Sulu Sultanate as a gift in consideration of the latter's military assistance to end the Chermin War (also known as the Brunei civil war). Nevertheless, there is an absence of actual evidence to indicate that Sabah was indeed granted to the Sulu Sultanate following the cessation of the Chermin War in 1673. Likewise, it was ambiguous as to whether the Sulu Sultanate's self-proclaimed entitlement or ownership to North Borneo was a result of a validly executed agreement or a mere gift from the Brunei Sultanate.

Following that, Associate Professor Dr. Bilcher Bala highlighted that the Brunei Sultanate had never been, in any occasion, handed over the territorial sovereignty over North Borneo to the Sulu Sultanate as no assistance was rendered by the latter in the Chermin War. Putting it in another way, no cession of the sovereignty of North Borneo was made to the Sultan of Sulu, instead North Borneo was found to have been granted to Baron von Overbeck. At this juncture, the audiences were made to understand that the historical claim to the North Borneo territory by the Sulu Sultanate lacked the pre-requisite legal standings and justifications. More importantly, Dr. Bilcher emphasised that all territorial claims over North Borneo ought to have ceased upon the transfer of territory in establishing the British protectorate. Mr. Golingai, on the other hand, shed light on the familial relationship and backgrounds of the Sulu claimants. From the people of Sulu's standpoint, the delivery of the Final Award by Dr. Stampa itself constituted a significant affirmation of their entitlement and ownership towards Sabah.

Having developed a better understanding of the historical antecedents of the Sulu dispute, the session was continued by Professor Dr Jason Chuah of Universiti Malaya who delivered an insightful Plenary Lecture entitled "***Reviewing the Legal and Procedural Issues in the Sulu case***". To begin with, Professor Dr. Jason brought to the audience's attention that the Sulu case is not only complex in nature but is further compounded by a corpus of legal and procedural issues.

Simply put, it is highly complex and multi-textured. The legal and procedural issues revolving around the Sulu case were examined from three different angles *viz*, the conflicting translation or interpretation of the 1878 Deed of Cession, the movement of the seat of arbitration, and the two schools of thought between the common law and the civil law jurisdictions in regard to the interpretation of "consent".

First, the varied outcome of the Spanish and English translations of the word "*pajakan*" in the 1878 Deed have resulted in the dilemma of whether it tantamount to a "lease" or "cession" of North Borneo by the then Sultan of Sulu to the Baron von Overbeck and Alfred Dent. Should the 1878 Deed be regarded as a cession, the 1878 Deed of Cession would naturally fall beyond the scope of a private commercial matter, and the doctrine of sovereign immunity will surface. Second, the movement of the seat of arbitration from Madrid (Spain) to Paris (France) is worth examining. At this juncture, it must be made clear that the Spanish Court naturally gains its judicial supervisory power, pursuant to Article 1 of the Spanish Arbitration Act when the purported Sulu case was first commenced in Spain. Thus, it appears preposterous for Dr. Stampa to move the seat of arbitration purely on the ground that the judicial intervention by the Spanish Court is illegitimate and prejudicial to the Claimants. Third, it is trite in the common law jurisdiction that consent of the parties being manifested in the arbitration agreement is of paramount importance to commence an arbitration proceeding. This, however, may not be the same practice as in some civil law countries wherein the requisite consent in a written agreement may be dispensed. In his concluding remark, Professor Dr. Jason explored the possible recourses available to Malaysia such as the application for interim remedies (anti-enforcement injunction), challenging the enforceability of the Final Award under French Law, and contesting its recognition in the New York Convention's signatories.

The Colloquium gradually reached its peak with the second panel discussion on the topic of "The Effects of the New York Convention and Sovereign Immunity". This session saw Datuk Tengku Fuad Tengku Ahmad Burhanuddin (Partner, Messrs FT Ahmad & Co) moderating a panel comprising Tan Sri Dato' Cecil Abraham (Senior Partner, Cecil Abraham & Partners, Chartered Arbitrator, and a Bencher of Middle Temple), Mr. Chan Leng Sun, SC (Senior Counsel and Chartered Arbitrator, Duxton Hill Chambers), and Ms. Elodie Dulac (Partner, King & Spalding & Singapore Representative on the ICC Commission on Arbitration and ADR). Much attention has been drawn to understanding the recognition and enforceability of the purported Final Award pursuant to Article V of the New York Convention ("the Convention"). Insofar as the enforcement of the purported Final Award is concerned, the panel underlined that the arbitral tribunal was not properly constituted at the outset, mainly due to the improper service of the notice of appointment upon Malaysia (Article V(1)(b) of the Convention). Similarly, the panel's analysis of the refusal of recognition and enforcement of the said Final Award on the basis of (a) the violation of public policy, and (b) that Dr. Stampa has exceeded his mandate due to the annulment of his appointment, have offered much food for thought.

Being a fundamental part of customary international law, the doctrine of sovereign immunity generally shields a state from the jurisdiction of another state, and it largely clinches on the

principle of reciprocity between states. Although the prevailing practice inclined to favour the restrictive doctrine of state immunity, it remains that an act of sovereignty is immune from the jurisdiction of another state, save and except it relates to commercial activity or waiver of such immunity is expressed by the state concerned. Given the absolute absence of an arbitration agreement in the Deed of Cession 1878, it is illogical to imply Malaysia's consent to submit to the jurisdiction of an arbitrator, and more so when Malaysia has not waived its sovereign immunity. As aptly described by Mr. Chan, the inexistence of an arbitration agreement in the 1878 Deed is one of the manifest egregious flaws in both the arbitral proceedings and the Final Award.

Following that, Dato' Firoz Hussein bin Ahmad Jamaluddin (Partner, Messrs Firoz Julian) taking the lead as the moderator in the final session of the Colloquium entitled "***Abuse of Arbitral Processes***", invited exchange of perspectives among the speakers, Professor Robert Volterra (Partner, Volterra Fietta & Visiting Professor of International Law at University College London, University of London), Dr. Stephan Wilske (Partner, Gleiss Lutz & Vice President of the CAAI Court of Arbitration), and Mr. Roger Chin Ken Fong (President, Sabah Law Society & Partner, Messrs Chin Lau Wong & Foo). The session began with an interchange and perspective on the definitions of "*abuse of the arbitral process*". The panel of speakers successfully grappled with complex issues that related to the Sulu claim. One of the many issues covered was the delicate problem of imposing a foreign award on a sovereign state – which may be easily abused as cautioned by Professor Volterra.

In the context of the Sulu case, flagrant abuse of the process was manifested at every level of the proceeding, and the arbitrator is said to have deviated from the fundamental principles of arbitration by cherry-picking Spanish law i.e., the arbitrator favoured Spanish law upon appointment but thereafter rejected it when his appointment was annulled. Besides, the arbitrator's application of the UNIDROIT Principles of International Commercial Contracts over findings based on a transfer of sovereignty are highly questionable and disputed. Members of the audience will also remember Mr. Roger Chin's apt description of the Sulu claim being a situation where it is the "*Weaponising of the Arbitration Process*". Alongside examining the abuse of arbitral processes in the present Sulu case, the panel seized the opportunity to shed light on the possible recourses which could be commenced against the arbitrator concerned and this ranges from the filling of complaints with the arbitrator's associations to institute criminal action, if necessary.

All in all, the International Arbitration Colloquium 2023 is a commendable effort in facilitating academic discourses on the strategic approaches in dealing with the complex issues of the Sulu claim, alongside preserving the efficacy of the globally respected arbitration system. Litigation in the Sulu case is ongoing in France, Spain, Luxembourg, and the Netherlands. Be that as it may, having assured by YB Dato' Sri Azalina Othman in her Keynote Address, the Government of Malaysia will not back off in executing its global legal strategies against the self-styled Claimants unless and until the purported Preliminary Award and the Final Award are quashed by the courts concerned.

WELCOMING REMARKS BY DATUK SUNDRA RAJOO DIRECTOR, ASIAN INTERNATIONAL ARBITRATION CENTRE (AIAC)

The International Arbitration Colloquium 2023 with the theme State Sovereignty and Immunity in Commercial Arbitration was set in motion with the welcoming remarks delivered by Datuk Sundra Rajoo. In his preliminary remarks, Datuk Sundra expressed his utmost gratitude to the collaborating partners, the Legal Affairs Division of the Prime Minister's Department (BHEUU), and the Faculty of Law, Universiti Malaysia for their unwavering commitment and contribution in pulling through the time constraint, difficulties, and challenges in bringing to the success of this Colloquium. Not to forget, on behalf of the organising institutions, Datuk Sundra also extended his appreciation to the speakers, moderators, and audience for travelling vast distances to participate and to be part of this Colloquium.

In his welcoming remarks, Datuk Sundra has canvassed a succinct background of the international arbitration battle which the Government of Malaysia is presently defending. As aptly described, the Government of Malaysia is compelled into a legal battle by eight self-proclaimed descendants of the Sulu Sultanate over a colonial agreement executed between Sultan Muhammad Jamal Al Alam (the then Sultan of Sulu) and Baron von Overbeck and Alfred Dent back in 1878. Following the issuance of the Final Award by Dr. Gonzalo Stampa in February 2022, the self-styled Claimants have been proactive in their enforcement strategies and movements across Europe in particular, France, Spain, Luxembourg, and the Netherlands. The Government of Malaysia, in response, has undertaken dimensional defensive actions to prevent the purported Sulu claimants from benefitting from the enforcement measures to the detriment of our citizens.

Having said that, Datuk Sundra pointed out that the Sulu case is a perfect illustration of a sophisticated abuse of the arbitral process and international law. Given the absolute absence of an arbitration agreement or any clause to that effect in the Deed of Cession 1878, Datuk Sundra illuminated that any commencement of the arbitration proceeding would constitute a direct violation of the fundamental principle of commercial arbitration. Similarly, the adamant continuation of the arbitral proceeding by Dr. Stampa despite the non-waiver of sovereign immunity by the Government of Malaysia has amounted to a breach of the customary international law on state immunity. Given the above, Datuk Sundra strongly opined that the recognition and enforceability of the purported Final Award should be rejected outright especially when our national security and sovereignty are in peril.

Notwithstanding the above, Datuk Sundra emphasised that the AIAC, established under the auspices of the Asian-African Legal Consultative Organisation (AALCO), remains steadfast in affording support and advice to the Government in strengthening Malaysia's strategies in this ongoing battle for justice. Certainly, the inauguration of this International Arbitration Colloquium demonstrated one of our many efforts in confronting the legitimacy of the purported Final Award. Known to many, this Colloquium strives to facilitate in-depth academic discourses among the

experts – ranging from the historical antecedents, the legal and procedural issues of the Sulu case, the effects of the New York Convention and national sovereign immunity, to the abuse of arbitral processes within the Sulu dispute. Through the panel discussions, they will shed light on the rationale and reasonings underpinning Malaysia's stance and the unsustainability of the Sulu case.

To that end, Datuk Sundra assured that the AIAC will continue to spread awareness and cultivate discourses to examine the dimensional aspects of the Sulu case vide our upcoming Colloquiums in Sabah and across Europe.

OPENING REMARKS BY DATO' SRI KHAIRUL DZAIMEE BIN DAUD DIRECTOR GENERAL, LEGAL AFFAIRS DIVISION OF THE PRIME MINISTER'S DEPARTMENT

Dato' Sri Khairul Dzaimee, in his opening remarks, welcomed the presence of the distinguished guests, members of media, esteemed panel of speakers, and moderators to this inaugural International Arbitration Colloquium 2023 with the specially curated theme State Sovereignty and Immunity in Commercial Arbitration. Much appreciation has been addressed to the Legal Affairs Division of the Prime Minister's Department (BHEUU), the Asian International Arbitration Centre (AIAC), and the Faculty of Law, Universiti Malaya for their joint effort and collaboration in making this Colloquium a reality.

As alluded to earlier by Datuk Sundra in his Welcoming Remarks, Dato' Sri Khairul Dzaimee echoed that this Colloquium serves to provide an ideal opportunity for the legal fraternity and members of the public to understand the plots and developments of the ongoing international dispute which the Government of Malaysia is confronting at present. For the benefit of the audience, Dato' Sri Khairul Dzaimee explained that the Government of Malaysia is engaged in a legal battle against eight self-styled heirs of the Sulu Sultanate over the alleged breach of payment obligation under the Deed of Cession 1878.

Notwithstanding the flagrant abuse of arbitral processes evident in the Sulu case, it is unfortunate that Dr. Gonzalo Stampa, the sole arbitrator, persistently continued with the proceedings up until the delivery of the Final Award in February 2022. The issuance of the purported Final Award has effectively triggered the enforcement measures and strategies of the self-proclaimed Claimants across Europe, in precisely, Luxembourg, France, Spain, and the Netherlands. As a result, the Government of Malaysia is compelled to partake in this unscrupulous claim by undertaking progressive strategies to counter the enforcement of the purported Final Award which amounted to $14.9 billion, constituting 16% of our annual budget.

Having been aware of the absence of an arbitration agreement in the Deed of Cession 1878, Dato' Sri Khairul Dzaimee emphasised that the commencement of the arbitral proceeding in Spain and subsequently in France could not be reasonably justified. The nature of the present Sulu dispute depicts a case of territorial sovereignty or, in simple terms, a non-commercial matter. Under such circumstances, no national courts and arbitral tribunal ought to assume jurisdiction to adjudicate matters relating to territorial sovereignty.

In light of the above, the inauguration of this International Arbitration Colloquium will enable various interrelated issues of the Sulu case to be discussed and explored in-depth by the panel of speakers. Akin to the Malaysia Sulu Case website, this Colloquium serves as an ideal platform to disseminate accurate information relating to the Sulu dispute to the domestic and international community. On that note, Dato' Sri Khairul Dzaimee assured that a similar Colloquium will be organised at Sabah and Europe to facilitate a more vigorous and extensive discourse over the Sulu case.

KEYNOTE ADDRESS BY YB DATO' SRI AZALINA OTHMAN SAID MINISTER IN THE PRIME MINISTER'S DEPARTMENT (LAW & INSTITUTIONAL REFORM)

The International Arbitration Colloquium 2023 reached its peak with the Keynote Address delivered by YB Dato' Sri Azalina Othman Said. In her preliminary address, YB Dato' Sri Azalina commended the Legal Affairs Division of the Prime Minister's Department (BHEUU, JPM), the Asian International Arbitration Centre (AIAC), and the Faculty of Law of Universiti Malaya for their fruitful collaboration in organising and ensuring the success of this Colloquium. YB Dato' Sri Azalina, at the outset, alluded that the overwhelming physical participation together with the audience tuning in to the livestream of the Colloquium manifested the domestic and global communities' concerns towards the ongoing Sulu dispute.

Putting aside the historical antecedents of the Sulu case, which have been extensively dealt with by the experts in the First Session, YB Dato' Sri Azalina explained that the Government of Malaysia has been relentlessly battling the enforcement of a purported international arbitration award, amounting to USD$14.9 billion (equivalent to over 16% of Malaysia's annual budget). No doubt, the legitimacy and validity of the purported Final Award are highly contested and questionable. As many may have already known, the present Sulu dispute traced its roots to a colonial agreement signed in 1878 which envisaged the ceding of the territory in North Borneo (in today's Sabah) by the Sulu Sultanate to Baron von Overbeck and Alfred Dent in consideration of an annual cession payment of 5,000 dollars.

YB Dato' Sri Azalina drew the audience's attention to the fact that neither the 1878 Agreement nor the 1903 Confirmation of Cession encapsulated any arbitration agreement or any similar clause to reflect the Parties' intention to adopt arbitration as the preferred dispute resolution mechanism. At most, the 1878 Agreement only stipulated a dispute resolution clause in the sense that the Parties ought to present their disputes before Her Britannic Majesty's Consul-General for Borneo. As such, YB Dato' Sri Azalina strongly viewed that it is wholly non-sensical when the Government of Malaysia is hauled into the arbitral proceedings knowing that the mutual consent of the Parties to submit to the jurisdiction is a pre-requisite and the bedrock of commercial arbitration. On that note, YB Dato' Sri Azalina echoed the proposition put forth by Professor Dr. Amde Sidik that the Government of Malaysia has been pushed to the wall and compelled to defend itself in this proceeding.

In furtherance, YB highlighted that the cessation of the annual cession payment by the Government of Malaysia was predominantly attributed to the Armed Invasion in Lahad Datu, Sabah in 2013, resulting in the demise of 73 people. Following that, our Federal Court, in 2018, upheld the death sentence for nine Filipino men charged with waging war against the Yang di-Pertuan Agong (YDPA), and terrorist-related offences linked to the armed intrusion back in 2013. Now, the fact that one of the Sulu claimants, Muhammad Fuad Abdullah Kiram is classified as a terrorist under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of

as a terrorist under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 for his close affiliation with the Royal Sulu Forces (RSF) in plotting the Lahad Datu Armed Incursion a decade ago, has answered many queries in relation to the roots of the self-styled Claimants.

With Malaysia's national sovereignty and security at stake, YB Dato' Sri Azalina accentuated that the present Sulu dispute should not, in any circumstances, be regarded as a commercial matter in which the arbitral tribunal could assume jurisdiction. Having said that, should the self-styled Claimants persistently assert the historical rights of the Sulu Sultanate over Sabah relying on their alleged ancestral ties to the region, YB Dato' Sri Azalina stressed that the International Court of Justice (ICJ) ought to be the appropriate forum to adjudicate over such territorial dispute. In the interim, the issue of a third-party funder must not be shrugged off easily having in mind that the present self-proclaimed Claimants are bankrolled by a third-party funder, Therium in mounting their claims in Madrid and Paris. YB Dato' Sri Azalina's question of whether the act of third-party funder in the present Sulu case would be tantamount to an act of blackmailing a sovereign state has offered much food for thought.

Given that the Sulu dispute is heavily compounded by a myriad of fundamental issues, YB Dato' Sri Azalina is confident that the International Arbitration Colloquium serves as a perfect platform not only to gather the foremost voices in the industry, but also to facilitate the sharing of thoughts and the dissection of these issues for the benefit of the global arbitration community and stakeholders. With that, it is in YB's aspiration that this Colloquium could aid to promote more active and informed discussions of the Sulu case within the arbitration community and the public at large while the Sulu case runs its course.

SESSION 1: A TALE THROUGH TIME: NAVIGATING THE HISTORICAL ANTECEDENTS OF THE PURPORTED SULU ARBITRATION[1]

Moderator:

Datuk Sundra Rajoo (Director, Asian International Arbitration Centre (AIAC))

Panellists:

1. **Associate Professor Dr. Bilcher Bala** (Associate Professor of Sociopolitic & Cultural of the Malaysian Borneo, Universiti Malaysia Sabah)
2. **Mr. Philip Golingai** (News Editor, Star Media Group)
3. **Professor Dr. Amde Sidik** (Chairman, Progressive Institute of Public Policy Analysis, Sabah)
4. **Mr. Shari Jeffri** (Historical Researcher)

Speaker 1: Mr. Shari Jeffri

The session started with Mr. Shari Jeffri providing a historical outline of the events. He presented his personal collection comprising over 300 years of documented evidence of antiquity on North Borneo ranging from 1600 to 1963. At the outset, he highlighted that multiple documents are required to be arranged, analysed, and studied in painting a clear outline of the present Sulu dispute.

Compilation of the Documented Evidence

Mr. Jeffri mentioned that it is irrefutable that North Borneo shared over 650 years of common history with Brunei, and that the Sulu dispute is perceived as an offshoot of the Civil War in Brunei. In this regard, he pointed to two major events namely, the Chermin War in 1673 and the Deed of Cession 1878. Between these two events, there are missing records which needed to be sourced in order to assess and understand the development of the Sulu claims.

According to Mr. Jeffri, an approximate of 5,976 documents specifically in relation to North Borneo's history are currently kept under the care of the National Archive of London. One of the most archaic documents which he found was originated from Spain, dated around 1500. However, he also remarked that North Borneo history was obscured during the intrusion of European powers.

Notwithstanding the above, Mr. Jeffri highlighted that there has been an ongoing misconception in respect of the 1878 Treaty. First, he stressed that the 1878 Treaty is not the primary and only instrument relevant to the present Sulu claim. In fact, the Sultan of Brunei signed four pieces of treaties with Baron von Overbeck in 1877 including a Commission dated 1878, and this

[1] Rapporteurs in session: AIAC Case Counsel, Prissilla Ann John and Miguel Jaime Carandang Encarnacion (reviewed by AIAC Case Counsel, Kho Yii Ting).

constituted part of the evidence which must be considered in assessing the development of the Sulu claim. Second, there is no such thing as the Sultan of Brunei granted the area in dispute to the Sultan of Sulu in 1673 merely in consideration for the military assistance rendered to the Sultan of Brunei.

Moreover, it was mentioned that both the Sultanates of Brunei and Sulu owned maritime empires with the central administrations located in Brunei and Jolo. Interestingly, Mr. Jeffri pointed out that both Sultanates were interrelated by way of royal marriages even as early as 1400. During the 300 years span of war between Spain and Sulu, it was found that North Borneo has always been the hideout from the onslaught of the mighty Spanish Empire.

The presentation has canvassed a glimpse on the sequence of events that led to the milestones in 1673, 1878, up until 2023. Mr. Jeffri emphasized that it is wholly insufficient to rely on solely the 1878 Treaty, instead much attention must be given as far back as the primer sources would allow. Not to forget, these sources are the perfect depictions of the developments pertaining to the diplomatic relations, policies, and sovereignty of North Borneo – in terms of the dealings with Brunei, the North Borneo Chartered Company, the Crown Colony, the Overbeck Association, among others.

Conclusion

In conclusion, Mr. Jeffri noted that there has been a prevailing paradox in respect of the availability of information, in a way where the previous colonial powers have kept documents related to the dispute, while the information is unfortunately least shared. This portion of the talk ended with a remark on the existence of many primary sources relating to the Sulu claim, and the manner in which each source unfolded the underlying historical antecedents.

Speaker 2: Professor Dr. Amde Sidik

Professor Dr. Sidik's presentation primarily focused on the relationship between Brunei, Borneo, and Malaysia from the historical standpoint. He began his discussion with a historical account concerning the Kingdom of Brunei which, at that material time, controlled the Northern part of the Malay Archipelago, including parts of the Philippines. At the height of the Kingdom of Brunei, it had then developed into Brunei Empire during the era of 1520 to 1527, and eventually extending its jurisdiction over the entire Borneo which included the coastal regions.

However, it is imperative to note that the emergence of the Brunei Empire was only evident following the demise of the Majapahit Empire. At the time, attributing to its large geographical territory, the Brunei Empire exercised considerable authority, jurisdiction, and power over the regions.

The Claims of the Sulu Sultanate

His presentation focused on the Statement of Claim, from a non-legalistic perspective, and the events that led to three primary agreements related to the present Sulu dispute. According to him, the statement entailing the Sulu's claim towards North Borneo encompassed two facets despite they appeared analogous.

First, according to the Sulu Sultanate, North Borneo belonged to Sulu because it was given by the Sultan of Brunei (Sultan Muhyiddin) to the Sultan of Sulu as a gift in return for the latter's warriors to defeat the opponents in the battle at Chermin Island. The discussion moved forward with a historical backdrop on the period from 1621 to 1673 when the royal households were in rivalry and strong competition due to the cockfighting festivities. This has led to the death of Sultan Mohamad Ali, and in turn, Sultan Mubin was proclaimed as the 14th Sultan of Brunei. However, his sultanate tenure did not last long due to the political hostilities and undercurrent. To pacify this situation, Sultan Mubin appointed Muhyiddin as the Chief Minister of Mubin's government. At that time, Muhyiddin was however consistently pressured by the supporters of the late Sultan Ali to seek revenge.

Following that, Muhyiddin advised Sultan Mubin to move the palace to Chermin Island, but upon the arrival of Sultan Mubin, Muhyiddin immediately proclaimed himself as the 15th Sultan of Brunei.

Consequently, Mubin went for exile in Kinarut for a duration of twelve years but was, on several occasions, tempted to return to Chermin Island. On the other hand, Sultan Muhyiddin was plotting to the capture Mubin and offered an area identified only through the pointing of fingers towards the direction of North Borneo should the men from Sulu assist to execute the plot. It is noteworthy that there was no mention about Sabah or Borneo. In view of these series of event, Professor Dr. Sidik highlighted the fact that there is an absence of actual evidence to indicate that Sabah was indeed granted to the Sulu Sultanate.

Whilst, the second facade relates to the infamous agreement made on 22nd January 1878, presently known as the Deed of Cession 1878. Almost 205 years later, there was an agreement signed between Baron Von de Overbeck and Sultan Jamalul Alam of Sulu relating to an area in Sandakan, specifically measured from River Pandasan to River Sibuko. This place is known as *Paitan*. Nevertheless, Professor Dr. Sidik mentioned that somewhat 24 days earlier, in 29th December 1877, there was an agreement executed between Sultan Abd Momin of Brunei with Baron Overbeck, which also encompassed the same area in *Paitan*.

At this juncture, Professor Dr. Sidik explained that Overbeck was conscious of the existence of both agreements given that he was a common party to both agreements. Notwithstanding that, the paramount question is whether the Sultan of Sulu derived the alleged ownership over the region of land in Sabah based on validly executed agreement, or as a matter of consideration for the military assistance rendered during the Chermin War.

Conclusion

The discussion ended with the question on how to reconcile these existing agreements. In dealing with this conundrum, it is advised that all relevant documents must be revisited to construct a proper understanding of the Sulu dispute from the historical standpoint. Professor Dr. Sidik mentioned that Malaysians are now forced to the wall, thus becoming defensive in response to the claims asserted by the now defunct Sulu Sultanate. This portion of the talk ended with a remark that "*one cannot give something it does not have*", being one evinced in the present Sulu dispute.

Speaker 3: Associate Professor Dr. Bilcher Bala

Associate Professor Bilcher Bala provided a comprehensive analysis of the historical evidence and events surrounding the Sulu Sultanate's claim to the territory of Sabah. His presentation addressed amongst others, the origins of the claim, the historical context, and the subsequent developments leading to the present-day dispute.

Origins of the Claim

According to Associate Professor Bilcher Bala, the claim of the Sulu Sultanate to the territory of North Borneo, now known as Sabah, emerged after the Brunei Civil War, which took place between 1661 and 1673. The Sulu Sultanate asserted its territorial sovereignty based on the tradition that Sultan Muhyiddin of Brunei gifted Sabah to them in exchange for military assistance during the war. However, there is no historical evidence supporting this claim, as there is no record of Sabah being handed over to the Sulu Sultanate in Brunei's history.

During the Brunei Civil War, the Sulu Sultanate was indeed called upon for military assistance by Bendahara Muhiyudin of Brunei. However, historical records of Brunei indicated that the Sulu army arrived late and thus played a minimal role in the outcome of the conflict. Bendahara Muhiyudin emerged victorious on Chermin Island without the assistance of the Sulu Army, and thereafter became the Sultan of Brunei. He subsequently denied the Sulu Sultanate's demand for the gift of Sabah, indicating that there was no submission of the territory of Sabah to the Sultan of Sulu.

From 1673 to 1877, the Sulu Sultanate sought recognition of its claim of sovereignty over the Sabah territory from the Brunei Sultanate. During the period between 1703 and 1877, the Sulu Sultanate extended its *de facto* influence over the east coast of Sabah, establishing *de facto* territories such as *Marudu Sendakan*, *Magindora Sembruna* and *Tawau Tiduk*. This formed the basis of the real claim of sovereignty by the Sulu Sultanate which has continued under the succeeding sultans. These actions, in Associate Professor Bilcher Bala's opinion, were viewed as acts of aggression against Brunei's sovereignty.

Concession Agreements and British Involvement

On 29th December 1877, the Sultan of Brunei and Baron Gustav von Overbeck signed a Concession Agreement, which granted concessions over the entire territory of Sabah to Baron Overbeck in exchange for an annual payment of 15,000.00 Mexican dollars. However, it is important to note that this agreement did not confer any ownership rights, as emphasized by Associate Professor Bilcher Bala.

After receiving the Concession Agreement from the Sultan of Brunei, William Hood Treacher, a British agent in Labuan, informed Baron Overbeck about the Sulu Sultanate's claim of sovereignty over the eastern territory extending from Sandakan to Tawau. In response to this claim, Baron Overbeck and William embarked on a journey to Jolo and successfully concluded a Concession Agreement with the Sultan of Sulu, Jamalul Alam on 22nd January 1878. Under this agreement, Baron Overbeck was granted control over the area from Sandakan to Tawau, with an annual payment of 5,000 Mexican dollars.

As part of the Agreement, the Sultan of Sulu bestowed upon Baron Overbeck the titles of Emperor of Sabah and Raja Sandakan dan Gaya (King of Sandakan and Gaya). Associate Professor Bilcher Bala highlighted that Baron Overbeck used the term "permanent lease" or "padjakan kekal" to describe the Agreement, indicating that the lease was intended to endure indefinitely. This term was used to indicate a long-term arrangement, acknowledging the Sulu Sultanate's claim which had been in existence for over three centuries.

Associate Professor Bilcher Bala pointed out that the inclusion of the clause in the Agreement, stating that the concession cannot be transferred to another power or company without permission from the British government, was perceived as a strategic move to undermine the Sulu Sultanate's claim on the territory of Sabah.

In 1878, the Sultan of Sulu tried to revoke the concession agreement with Baron de Overbeck, citing the sovereignty of Sulu Island and Sabah territory under Spain. He sent a letter to the Spanish authorities in Manila on 22nd July 1878 for assistance. However, the Spanish authorities rejected the request based on previous agreements, including the Spanish-Sulu Agreement of 1836, the Spanish and Sulu Sultan Agreement of 1851, which affirmed Spain's sovereignty over the Sulu Island, and the Sulu Protocol Agreement.

Following these events, the Madrid Protocol Agreement was signed in 1885 which further recognized British sovereignty over the mainland of Sabah, administered by the British North Borneo Company. This led to the signing of a Protectorate Agreement with the British government, and similar agreements Brunei, and Sarawak in the late 19th Century.

The British North Borneo Company sought an agreement with the new Sultan of Sulu, Sultan Jamallul Kiram II, to permanently cede the Sabah territory. The 1903 Agreement confirmed the cessation of the Saturn Island and specified the annual compensation to the Sultan of Sulu. This agreement marked the end of the Sulu Sultanate's sovereignty rights claim, as the British North Borneo Company provided evidence of lease or rental rights exercised over Sabah from 1878 to 1903.

Following the demise of Sultan Jamalul Kiram II in 1936, his heirs demanded the continuation of compensation, but their claim was not entertained by the British Council due to the abolition and non-recognition of the Sulu Sultanate by the Philippines government. The case was brought to the North Borneo High Court in 1939, and the court decision recognized the original nine heirs as legitimate. However, the institution of the Sultan was abolished in 1937, further undermining the claim of the Sulu Sultanate over Sabah.

The Formation of Malaysia

In 1961, the heirs of the Sulu Sultanate opposed the idea of Malaysia and urged the Philippines government to assert sovereignty over Sabah. At first, the Philippine government did not take the claim seriously. However, when the Cobbold Commission referendum results indicated that majority of the people in Sabah and Sarawak supported the formation of Malaysia, the Philippines government lodged an objection with the United Nations, stating that Sabah should not be incorporated into Malaysia. The Malaysia Agreement, signed on 9th July 1963, has effectively transferred the sovereignty of Sabah and Sarawak from the British government to Malaysia. The Philippines and Indonesia, who did not endorse the agreement, convened the Manila Accord on 3rd August 1963 agreeing to a United Nations-administered referendum in Sabah and Sarawak. On 16th September 1963, Malaysia was established, reflecting the aspirations of the people of Sabah and Sarawak to participate in the inauguration of Malaysia.

On 12th February 2013, an invasion took place in Lahat Datu by more than 100 individuals posing as members of the Royal Sulu Army and sought to claim control over Sabah. In response to this incursion, the Malaysian government halted the annual payment to the heirs of the Sulu Sultan, signalling their firm stance against the invasion.

Conclusion

In conclusion, based on the historical evidence and agreements discussed, the Sulu Sultanate's claim to Sabah lacked a valid foundation. The historical events, concession agreements, and legal proceedings strongly support the sovereignty of Sabah under Malaysia. The claim has been consistently denied and is deemed irrelevant. The portion of the session ended with the remark on how the Sulu Sultanate claim has ceased with the transfer of the Sabah territory as a British protectorate.

Speaker 4: Mr. Philip Golingai

Mr. Golingai shared his insights on the Sulu claimants, who are individuals asserting the Sulu Sultanate's historical claim over the territory of Sabah as well the significance of the North Borneo High Court's decision on 1939 (the Mascaskie Judgement 1939). He then delved further into the Sulu people's perception of the purported Final Award.

Sulu Claimants and their connection to Sabah

According to Mr. Golingai, the Sulu claimants, who asserted the historical rights of the Sulu Sultanate over Sabah, comprise both Filipinos and Sabahans who believe in their ancestral ties to the region. Their connection to Sabah is evidenced through notable individuals and personal associations. One such example is Datu Punjungan Kiram, an heir recognized in the Macaskie Judgement, who resided in Sabah from 1968 to 1980 with the expectation of being crowned as the Sultan of Sabah. This demonstrates the Claimants' direct involvement in Sabah's affairs.

Another prominent figure is Raja Muda Adbimuddi Kiram, the brother of Jamalul Kiram. Raja Muda led an incursion into Sabah that resulted in the cessation of annual payments. Prior to this incident, he had served as an Assistant District Officer in Kudat between 1974 and 1979, further solidifying the close link between the Claimants and the region. These individuals' active presence in Sabah underscores the depth of their connection to the territory.

Additionally, some Sulu Claimants themselves have either lived in Sabah or have relatives residing in the region. It is noteworthy that a number of claimants have relatives who reside in Malaysia, and one have pursued education at the Institute Teknologi Mara (now known as UiTM). These personal connections between the Claimants and Sabah highlight the intertwined history between the Sulu claimants and the region, further strengthening their belief in their rightful ownership.

Perception of the purported Final Award

According to Mr. Golingai, the Sulu people perceived the purported Final Award as a validation of their claim to Sabah. In their perspective, Dr. Stampa's decision to award US$14.9 billion to the Claimants signified a confirmation of their rightful ownership. They considered the purported Final Award as conclusive evidence that Malaysia has unlawfully taken Sabah from them. This perception shapes their deep-rooted sentiment of Sabah being a stolen territory.

Conclusion

The self-styled Sulu Claimants, consisting of Filipinos and Sabahans, appeared to demonstrate a strong connection to Sabah based on their ancestral ties and personal associations. Notable individuals closely linked to Sabah's affairs, along with the Claimants who have lived in the region or have relatives residing there, underscore the depth of their involvement. Moreover, the perception of the purported Final Award as a vindication of their claims further strengthens their belief that Sabah rightfully belongs to them. Understanding these perspectives are essential in comprehending the complex historical ties between the Sulu Claimants and Sabah.

PLENARY LECTURE: REVIEWING THE LEGAL AND PROCEDURAL ISSUES IN THE SULU CASE[2]

Presenter: Professor Dr. Jason Chuah (Dean and Professor of International Commercial Law, Faculty of Law, Universiti Malaya)

Professor Dr. Jason Chuah, in his preliminary remark, pointed out that the Sulu case is a relatively complex and multi-textured international dispute compounded by a corpus of legal and procedural issues. In his plenary lecture, Dr. Jason drew the audience's attention to the highlights of the Sulu case, the legal and procedural challenges encountered by Malaysia, and the possible recourses available to Malaysia.

PART 1: Legal and Procedural Issues

1. Existence of the Arbitration Agreement

Dr. Chuah kick-started his lecture by addressing one of the most important issues at stake - whether there is an agreement to arbitrate encapsulated in the Deed of Cession 1878. To address this concern, he referred to the purported arbitration clause in the 1878 Deed which is heavily relied upon by the Claimants in the present claim. The purported arbitration clause read as follows:

> *"In case of any dispute shall arise between His Highness the Sultan, his heirs or successors and the said Gustavus Baron de Overbeck or his Company it is hereby agreed that the matter shall be submitted to Her Britannic Majesty's Consul-General for Borneo"*

Based on the above, Dr. Chuah emphasised that there is no explicit reference in the 1878 Deed that reflects the Parties' mutual consent to refer the disputes to arbitration. Neither did the expression of the language in this provision indicate that this is an arbitration agreement,[3] nor did it provide for the seat of arbitration in Spain. To fortify Dr. Chuah's observation, it is worth noting that the absence of a validly binding arbitration agreement has been verily affirmed by the High Court of Malaysia back in 2020.[4]

[2] Rapporteurs in session: AIAC Case Counsel, Raagini a/p Sama Sundaram and Teoh Shu Ling (reviewed by AIAC Case Counsel, Kho Yii Ting).
[3] Wojciech Sadowski and Marcin J. Menkes. (2023). *Malaysia: The Iconic Case to The Heirs of The Sultan of Sulu vs. Malaysia*. Retrieved from The Iconic Case To The Heirs Of The Sultan Of Sulu vs. Malaysia - Arbitration & Dispute Resolution - Malaysia (mondaq.com) [Accessed on 16th May 2023].
[4] *Government of Malaysia v Nurhima Kiram Fornan & Ors* [2020] MLJU 425.

2. A Commercial Matter or Sovereignty Issue?

The 1878 Deed was originally executed in Malay (Jawi) but was later translated into Spanish and English. Specifically, in respect of the word "pajakan" used in the 1878 Deed, the Spanish translation "arrendamiento" implied the meaning of "lease" whilst, in English, it was translated as a "cession" or "grant". As such, the variance in the translation gave rise to a critical proposition, wherein the word "lease" could conceivably be regarded as a private commercial matter. In contrast, the adoption of the English translation i.e., "cession" would tantamount to the 1878 Deed falling beyond the scope of a private commercial matter, through which the issue of sovereign immunity will naturally surface.

However, the sole arbitrator, Dr. Stampa decided that the Spanish translation prevailed on the basis that it was made in the same year as the original. Relying on the Spanish translation, Dr. Stampa distinguished the term agreement from the term treaty, and eventually characterised the 1878 Deed of Cession as 'commercial' in nature - the Final Award reads as follows[5]:

> *"... Therefore, it seems that the Baron of Overbeck –as one of the signatories of the 1878 Agreement clearly distinguished the term agreement from the term treaty and, on that basis, characterised the 1878 Agreement as an agreement of a commercial nature."*

At this juncture, one important question that begs to be answered is the reliability of the Spanish translation. It is unfortunately very much less reliable.[6] In theory, in 1851, Spain effectively cornered the Sultan into signing a treaty which positioned most of the Sulu territories under Spanish sovereignty.[7] These aggressions have prompted the Sultan of Sulu to give away North Borneo to Overbeck and Dent, in return for pecuniary consideration.[8] Given the Spanish's vested interest in the Sulu territory, the idea of the commercial lease was preferred over "cession" at the time of undertaking the Spanish translation.

3. Movement in the Seat of Arbitration

The Sulu arbitration was initially commenced by the self-styled descendants of the Sulu Sultanate in Madrid, Spain. Needless to say, it naturally follows that the national courts in Spain would assume judicial supervisory jurisdiction over any arbitration proceedings commenced within the territory. This is reflected in Article 1 of the Spanish Arbitration Act 2003.

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[5] Nurhima Kiram Fornan & Others vs Malaysia, Final Award dated 28th February 2022, para 202.
[6] Aiza Mohamad. (2023). *Malaysia's Sulu Problem: Logical Flaws in the Arbitration Process.* Retrieved from Malaysia's Sulu Problem: Logical Flaws in the Arbitration Process | FULCRUM [Accessed on 15th May 2023].
[7] Ibid.
[8] Ibid.

Evidently, in the Sulu dispute, the Superior Court of Justice in Madrid intervened and nullified Dr. Stampa's appointment on the basis of the procedural irregularity *viz*, the improper service of the Notice of Arbitration to the Malaysian embassy in Madrid. Dr Stampa nevertheless refused to comply, and subsequently declared the Spanish court's ruling as an unjustified interference into the autonomy of international arbitration proceedings.[9] In view of the potential prejudice to the purported Claimants, Dr. Stampa opined that it would not be fair to continue the arbitration in Spain and thus, decided to move the seat of arbitration to Paris, to which the choice of France as the new seat had no basis, either.[10]

As France is known for its pro-arbitration stance, wherein even with the absence of a French arbitration clause as well as having no territorial connection, it remains possible to commence arbitration proceedings in France. The capricious movement in the seat of arbitration from Spain to France has clearly demonstrated an act of 'forum shopping'. Taking advantage of the pro-arbitration stance in France, Dr. Stampa has proceeded to deliver a Final Award in favour of the self-proclaimed heirs of the Sulu Sultanate on 28th February 2022.

4. Interpretation of 'Consent'

During his lecture, Dr. Chuah distinguished the interpretation of the element of "consent" in both the common and civil law jurisdictions. In the common law jurisdiction, consent is the bedrock of a validly binding arbitration proceeding wherein the mutual consent of both parties to refer their disputes to arbitration is of paramount importance. Simply put, the absence of an arbitration agreement will impede the commencement of an arbitration proceeding. Further, this stance was echoing the English legal authority, where the Supreme Court of England is inclined to reject the enforcement of the arbitral award granted against Pakistan after taking into consideration the lacked of mutual consent between the parties to arbitrate their disputes.[11]

Nonetheless, this may not be similarly practiced in the civil law jurisdiction. In the realm of civil law, the agreement of the parties to arbitrate and the territorial connection of the subject matter in dispute to the seat of arbitration may be dispensed. Rather, mere proof of 'some' element of consent would suffice.

[9] Wojciech Sadowski and Marcin J. Menkes. (2023). *Malaysia: The Iconic Case to The Heirs of The Sultan of Sulu vs. Malaysia*. Retrieved from The Iconic Case To The Heirs Of The Sultan Of Sulu vs. Malaysia - Arbitration & Dispute Resolution - Malaysia (mondaq.com) [Accessed on 16th May 2023].
[10] Ibid.
[11] *Dallah v. Government of Pakistan* [2011] 1 AC 763.

PART 2: Options for Malaysia Moving Forward

Dr. Jason Chuah, in the latter part of his lecture, also explored on the array of potential options for Malaysia, though not exhaustive.

1) Challenge on the Enforcement of the Arbitral Award

Akin to Malaysia's present global legal strategy, progressive litigation against the enforcement of the purported Final Award is among the feasible way to prevent the self-styled Claimants from benefitting the Final Award to the detriment of the Malaysian citizens. Having said that, Dr. Chuah explained that the strategy of challenging the enforceability of the Final Award is twofold – domestically under the French law, and internationally under the New York Convention ("**the Convention**").

Since the arbitration proceeding and the purported Final Award were rendered in France, it would naturally be recognised as a domestic French award or judgement. This would mean that the Final Award could be challenged under the French domestic law, and subsequently be set aside by their national courts. Should the French court later declare the nullity of the purported Final Award, the said award would lose its legally binding force domestically, and concurrently, Malaysia will gain a favourable chance to challenge the enforceability of the purported Final Award under Article V(1)(e) of the Convention. As aptly described by Dr. Jason Chuah, such situation, if arises, would be of great "strategic importance" to Malaysia.

Alternatively, challenge against the enforcement of the purported Final Award can be undertaken pursuant to Article V of the Convention. It is worth mentioned that the Convention serves to facilitate the recognition and enforcement of arbitral awards across different jurisdictions to the greatest extent possible. Concurrently, the national courts of the signatory states are afforded a high degree of flexibility and discretion in determining the recognition and enforceability of an arbitral award.[12] Putting it another way, the national courts of the Contracting State may, in its discretion, refuse to recognise and enforce an arbitral award on the grounds envisaged in Article V, without being strictly obligated to do so.[13]

It is observed that the Claimants have been actively attempting to seek recognition and enforcement of the purported Final Award in various jurisdictions across Europe in particular, the Netherlands, Luxembourg, and France. In light of the above, the recognition and enforcement of the arbitral award may be refused pursuant to Article V(1)(a) of the Convention which entails the incapacity of the parties to the arbitration agreement, and the invalidity of the arbitration said agreement under the law which the parties have subjected it

[12] United Nations UNCITRAL. (n.d.). *New York Convention 1958 Guide - Travaux Préparatoires on Article V of the New York Convention.* Retrieved from https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=730&opac_view=1#:~:text=Article%20V%20of%20the%20New,recognition%20and%20enforcement%20is%20sought [Accessed on 19th May 2023].
[13] Ibid.

or, under the law of the country where the award was made.[14] Unlike the modern-day model arbitration agreement/clause, the dispute resolution clause stipulated in the 1878 Deed is 'porous' and clearly resembled a pathological clause as what we understand in the present context of commercial arbitration.

As alluded to above, the recognition and enforcement of the arbitral award may be refused under Article V(1)(e) of the Convention which provides that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country, or under the law of which that award was made.[15] Applying to the present case, the seat of the arbitration was moved from Madrid to Paris. This has triggered a global concern as to the governing law of the purported arbitration i.e., whether the Spanish law, the French law, or both is to be taken as the *lex arbitrii*. Whilst noting that the movement in the seat of arbitration is not unprecedented, nevertheless, it should only be done under exceptionally special circumstances. Take for instance, the so-called exceptional circumstances include the "changed circumstances" or "*rebus sic stantibus*" involving a change of attitude of the State party, or of its political regime resulting "unduly difficulty" in the conduct of an ordinary arbitral proceedings in that venue.[16] Nonetheless, no such circumstance was evident in the Sulu arbitration proceedings. The change of the seat of arbitration - this on its own is highly contentious.

Likewise, the recognition and enforcement of an arbitral award may be refused if the subject matter of the difference is not capable of settlement by arbitration under the law of that country.[17] Specifically, it is a settled law that matters involving sovereign immunity are non-arbitrable, let alone the enforceability of such arbitral award.

2) Interim Remedies

Secondly, Malaysia may apply for the following interim remedies from the domestic forum courts:

a) **Local Procedural Irregularities** – The German courts, for instance, is inclined to reject the recognition and enforcement of the arbitral award should the said award be delivered without proper conformity to the domestic procedural laws.

b) **Anti-enforcement Injunction** – It is a typically rare interim relief granted by the national court save in England and Singapore which have recorded previous accounts of awarding such remedy to the parties. As its name goes, this form of injunction serves to inhibit the enforcement of an arbitral award or judgement. To be eligible, the applicant must first

[14] Article V(1)(a), New York Convention 1958.
[15] Article V(1)(e), New York Convention 1958.
[16] Pierre Lalive. (2002). *On The Transfer of Seat in International Arbitration*. Transnational Publication. At p. 516-517. Retrieved from https://cdn.arbitration-icca.org/s3fs public/document/media_document/media012319088070580transfer_of_seat.pdf
[17] Article V(1)(a), New York Convention 1958.

satisfy the relatively high legal threshold and prove that the subject matter in claim has a territorial connection to the jurisdiction where such relief is sought.

3) Other Possible Recourses

Thirdly, Dr. Chuah explained the potential actions to be instituted against the arbitrator, counsel, and third-party funders as this claim is bankrolled by a global litigation funder, Therium. While Dr Stampa is now indicted in Spain for contempt of court, instituting legal actions against the counsel and third-party funder may be relatively tricky.

In respect of the notion of third-party funding, it has gradually become a prevailing concern in United Kingdom, United States, and Europe for its inherent tendency to be intertwined with terrorist financing and money laundering. To that end, it is worth highlighting that one of the self-styled heirs of the Sulu Sultanate has recently been classified by the Government of Malaysia as a terrorist for his affiliation to the armed group behind the Lahad Datu invasion back in 2013. On that basis, if the third-party funder is aware of this and continued funding, it could easily be considered as an act of terrorist or terrorism related financing.

Conclusion

Dr. Chuah concluded his lecture by providing an overview of the approaches and strategies moving forward which included the codification of a domestic state immunity legislation, echoing the resolution put forward by YB Dato' Sri Azalina Othman Said. Sufficient reference could be made to the UK's State Immunity Act 1978, and the US's Foreign Sovereign Immunities Act 1976 which incorporated a relatively clear delineation between the "commercial activities" and "sovereignty acts". All in all, Dr. Chuah opined that the subject matter in dispute is not a "commercial matter", instead it relates to the issue of sovereignty which raise the question of its arbitrability i.e., whether the rights and obligations of the British North Borneo Company was rightly passed on or succeeded to a state. Ultimately, it is a question of sovereign rights, territorial rights, protection, diplomacy, and military advise of two states – which no doubt is 'non-arbitrable'.

SESSION 2: THE EFFECTS OF LAW OF NEW YORK CONVENTION AND SOVEREIGN IMMUNITY[18]

Moderator:

Datuk Tengku Fuad Tengku Ahmad Burhanuddin (Partner, Messrs FT Ahmad & Co)

Panellists:

1. **Tan Sri Dato' Cecil Abraham** (Senior Partner, Cecil Abraham & Partners, and Chartered Arbitrator and a Bencher of Middle Temple)
2. **Mr. Chan Leng Sun, SC** (Senior Counsel and Chartered Arbitrator, Duxton Hill Chambers)
3. **Ms. Elodie Dulac** (Partner, King & Spalding, and the Singapore Representative on the ICC Commission on Arbitration and ADR)

Speaker 1: Tan Sri Dato' Cecil Abraham

This session began with an introductory remark that, to date, a total of 171 countries have adopted and ratified the New York Convention of 1958 ("**the Convention**"). As such, under the Convention, an arbitration award issued in any other state is generally enforceable in other contracting state subject to limited grounds of defence. Simply put, this means that the Final Award issued by Dr. Stampa in Paris in respect of the arbitration proceedings between the self-proclaimed descendants of the Philippines-based Sulu Sultanate ("**the Claimants**") and Malaysia could be freely enforced in any signatory states of the Convention. In fact, this has turned into a real danger faced by Malaysia as the Claimants have attempted and are still attempting to enforce the purported Final Award in the Netherlands, Luxembourg, and France pursuant to Article III of the Convention.

In the session, Tan Sri outlined the relevant grounds to justify the refusal in recognising and enforcing the Final Award under Article V(II)(b) of the Convention. Specifically in respect of the present Sulu case, these grounds appeared relevant (i) the arbitral tribunal is not properly constituted; (ii) Malaysia was not given proper notice on the appointment of the arbitrator; (iii) there will be a violation of public policy should the Final Award is enforced; and (iv) the arbitrator has exceeded his mandate.

It is likewise doubtful as to the independence and impartiality of the arbitrator, Dr. Stampa as the background facts indicated that he had, on previous occasions, engaged with a firm who is now the solicitors on record. Apart from that, the existence of a valid "arbitral award" within the scope of Article I (2) of the Convention is contentious, taking into consideration of the fact that Dr. Stampa was appointed under the Spanish Law, and his appointment was later annulled by the Spanish Court.

[18] Rapporteurs in session: AIAC Case Counsel, Ooi Wei Qian and Balqis Binti Azhar (reviewed by AIAC Case Counsel, Kho Yii Ting).

Tan Sri further discussed the principle of sovereign immunity being one of the defenses put forward by Malaysia against the Sulu claim. Sovereign immunity, in essence, carries the idea that a state shall not be subject to the jurisdiction of another state. It is a principle well-established under the customary international law based on the notion of reciprocity and mutual recognition between the States. To further enlighten the participants on the doctrine of sovereign immunity, Tan Sri elaborated on the numerous circumstances where the sovereign immunity could be deemed waived. One notable example of waiver is when a sovereign state enters into an arbitration agreement with a private individual or entity.

In this regard, Tan Sri remarked that Malaysia has never, in any occasion, waived its sovereignty immunity in any jurisdiction involving the Sulu dispute. On that basis, the arbitrator clearly does not possess any valid jurisdiction to adjudicate the dispute, and more so when it involved the sovereign right of Sabah's natural wealth and resources. Therefore, any form of restitution awarded under the purported Final Award be it in monetary terms would seriously infringe Malaysia's territorial sovereignty and violate the self-determination by the people of Sabah. In fact, these are the ground in which the Final Award is ordered to be stayed by the Paris Court of Appeal.

The notion of self-determination as mentioned by Tan Sri is likewise another core principle of international law, arising from customary international law. From a sovereignty point of view, it connotes the legal right of people to decide their own destiny in an international order. The Cobbold Commission Report 1962 ("**the Commission Report**") has recorded the majority views of the people in North Borneo to participate in the formation of Federation of Malaysia. The Commission Report, in its clear terms, envisaged that about two-thirds of the Sabah population favored the realisation of Malaysia, while half of the portion supported the formation of Malaysia without demanding for certain conditions and safeguards.

Further, Tan Sri accentuated that the 1878 Agreement is not a commercial agreement but one that relates to the cession of land and territorial sovereignty over Sabah. Disputes over territorial rights are, as a matter of fact, not arbitrable and the International Court of Justice (ICJ) ought to be the appropriate forum to preside over such territorial dispute between the States.

Before ending his presentation, Tan Sri walked the audience through the numerous occurrences of abuse of process in the Sulu dispute. As observed, the purported Claimants have been proactive in their attempts to seize the assets of Petronas, allegedly Malaysia's government-linked company (GLC), in various jurisdictions. Having said that, it is settled in the common law jurisdiction that an agency engages in purely commercial activity stands as a separate and independent entity of the sovereign state. Given that Petronas engages purely in commercial activity, it is thus a standalone entity without having its assets jeopardised by the purported Final Award. Notwithstanding that, it is foreseeable that the Claimants will not cease in its attempt to seek enforcement of the purported Final Award in the remaining signatory states unless and until it reaps the complete benefits of the said Award.

As a precautionary measure, Tan Sri Cecil Abraham echoed YB Dato' Sri Azalina Othman Said's position that it is time for our legislature to introduce and implement a domestic sovereign immunity legislation in Malaysia[19].

Speaker 2: Chan Leng Sun, SC

Mr. Chan Leng Sun, SC, took the baton from Tan Sri and continued the discussion of sovereign immunity in the context of international arbitration, as well as of the abuse of process throughout the arbitral proceedings in the Sulu case. He revisited the case of *Belhaj v Straw* [2017] AC 964 as a springboard to the discussion pertaining to the Sulu case. Two defenses were raised in the case of Belhaj namely, the state immunity or sovereign immunity, and the act of state doctrine.

Interestingly, as explained by Mr. Chan, the act of state doctrine is an intertwined yet separated notion from the doctrine of sovereign immunity. The act of state doctrine, in essence, concerns the justiciability of the subject matter in the proceeding. In simple term, when a forum court is confronted with cases involving an act of sovereign, the determination as to the legality of the sovereign act in question would transcend the court's jurisdiction.

In the present Sulu dispute, the Government of Malaysia stands against the recognition and enforceability of the purported Final Award. Given the absolute absence of an arbitration agreement in the Deed of Cession 1878, it is illogical to imply Malaysia's consent to submit to the jurisdiction of an arbitrator, and more so when Malaysia has not waived its sovereign immunity. Mr. Chan described the non-existence of an arbitration agreement in the 1878 Deed as one of the manifest egregious flaws in both the proceedings and the Final Award.

It is worth noting that both Tan Sri and Mr. Chan shared a common observation with respect to the legality of the appointment of Dr. Stampa. Further to Tan Sri's observation that the Spanish Court has annulled the appointment of the arbitrator, Mr. Chan pointed out that the 1878 Agreement did not confer Spain with the relevant authority to appoint an arbitrator. Neither is Spain the expressed nor the implied seat of arbitration.

Nonetheless, the arbitrator was ignorant of the Madrid court's decision and thereafter arbitrarily moved the seat of the arbitration from Spain to France. Mr. Chan further described the movement of the seat by Dr. Stampa as bizarre as the potential denial of justice, being the *rationale* cited by the arbitrator, evidently fall short of a reasonable ground to justify such movement.

Evidently, the arbitrator has established a high level of dedication in the pursuit of the Sulu dispute, turning a blind eye to the Spanish Court's annulment order. It was in Mr. Chan's

[19] Bernama. (2023, May 9). *Azalina calls for state immunity to protect Malaysia from foreign claims*. New Straits Times. Retrieved from https://www.nst.com.my/news/nation/2023/05/907544/azalina-calls-state-immunity-act-protect-malaysia-foreign claims#:~:text=Azalina%20calls%20for%20state%20immunity%20act%20to%20protect%20Malaysia%20from%20foreign%20claims,-By%20Bernama&text=KUALA%20LUMPUR%3A%20Malaysia%20should%20consider,Datuk%20Seri%20Azalina%20Othman%20Said [Accessed on 17th May 2023].

observation that the purported Final Award went beyond the determination of a pure contractual or commercial dispute which the arbitrator claimed to be. Dr. Stampa, in his Final Award, declared the termination of the 1878 Agreement and affirmed the rightful sovereignty over the Borneo territory has now reverted to the Sulu claimants as a landlord. This clearly demonstrated a ruling pertaining to the territorial sovereignty and territorial rights over Sabah in which its non-arbitrability is a settled law.

The sophisticated abuse of arbitral process is observed particularly upon the unanticipated delivery of the Final Award, given that the appointment of Dr. Stampa was declared null by the Spanish court. The rendering of the purported Final Award back in February 2022 has shocked the conscience of the global arbitration community. Upon scrutiny of the peculiar factual circumstances, the 1878 Agreement did not provide any expressed wording that the disputes are to be arbitrated, let alone the seat of arbitration and the governing law. The relevant text in the 1878 Agreement is reproduced below:

> *"In case any dispute shall arise between His Highness the Sultan his heirs or successors and the said Gustavus Baron de Overbeck or his Company it is hereby agreed that the matter shall be submitted to Her Britannic Majesty's Consul-General for Borneo."*[20]

Prima facie, the 1878 Agreement stated that any dispute concerning the agreement must be brought before Her Britannic Majesty's Consul-General for Borneo. Knowing the non-existence of the office of "*Her Britannic Majesty's Consul-General for Borneo*", the Claimants had approached the Foreign and Commonwealth Office (FCO) in the United Kingdom to preside and adjudicate over the matter in 2017. Following the dismissal of the Claimant's application by the FCO, the self-styled Claimants have routed to Spain, thereafter to France in pursuing their claim against Malaysia. By opting to institute their claim in the courts of United Kingdom and Spain, being the former colonial rulers of Malaysia and the Philippines respectively, the self-styled Claimants are seemingly attempting to leverage the colonial sentiments in their claims.

Notwithstanding the above, it is puzzling that the European courts decided to hear the Claimants' case in the first place, despite the Spanish court has later revoked the appointment of Dr. Stampa and ordered the immediate termination of the arbitral proceeding. Any cursory examination or research of the case would reveal the absence of an arbitration clause in the 1878 Agreement. On that basis, it is sufficient to nullify the arbitral proceeding.

Now, the issuance of the Final Award by Dr. Stampa has set a relatively unprecedented and alarming precedent in the landscape of international arbitration wherein issues relating to territorial sovereignty appeared to be arbitrable. Yet another concern is that the act of forum shopping, if unrestrained, would undermine the legitimate authority of national courts in handling proceedings with complex nuances.

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[20] British North Borneo Treaties 1878. Retrieved from https://sagc.sabah.gov.my/sites/default/files/law/GrantBySultanOfSuluOfTerritoriesAndLandsOnTheMainlandOfTheIslandOfBorneo.pdf [Accessed on 17th May 2023].

Speaker 3: Elodie Dulac

Having heard the observations of Tan Sri Cecil and Mr. Chan, Ms. Elodie Dulac was invited to shed light on the waiver of state immunity in the French jurisdiction.

At the outset, she explained that France has adopted the widespread practice of the restrictive doctrine of state immunity, and brought the participants through the developments of this doctrine dating back to the early 2000s. In the early 2000s, it appeared that France took a rather broad approach in the sense that a mere signing of an arbitration agreement would tantamount to a waiver of sovereign immunity from enforcement. Nonetheless, this broad approach was later refined and a more restrictive stance was undertaken instead. Following that, in year 2000, the French courts adopted a stricter approach in dealing with the waiver of sovereign immunity specifically requiring an express waiver of state immunity from enforcement together with a special waiver in respect of diplomatic assets. Such stringent approach was affirmed by the French court a decade later.

Having said that, the trend from 2015 onwards illustrated that France once again embraced a more liberal approach. This is evident vide the French Supreme Court's ruling that an expressed waiver of immunity from enforcement would suffice, and need not to be specifically referred to the diplomatic assets. This is particularly significant when it concerns the bank accounts of diplomatic missions based in France. In *Import Export SA v the Republic of Congo* (Cass. Civ.1, 13 May 2015, Commisimpex c. Congo), the *Cour de Cassation* dispensed the stringent requirement that waiver of state immunity from enforcement must be specific (in addition to express waiver must be made), and propounded that "*customary international law does not require a waiver of the execution immunity to be anything else than express.*"[21]

At present, the regulatory regime governing the sovereign immunity and the enforcement measure against a foreign state's assets in France are comprehensively set forth in the Code of Civil Enforcement Procedure. The enforcement of assets in France may be granted in three circumstances stipulated in the Article L.111-1-2 of the Code of Civil Enforcement Procedure[22]:

I. *The State concerned has expressly consented to the application of such measure;*
II. *The State concerned has reserved or affected this property to the satisfaction of the claim which is the purpose of the proceedings;*
III. *When a judgment or an arbitral award has been rendered against the State concerned and the property at issue is specifically in use or intended to be used by the State concerned for other than government non-commercial purposes and is linked to the entity against which the proceedings are initiated.*

[21] Court of Cassation, Civil, Civil Chamber 1, May 13, 2015, 13-17.751. Retrieved from https://www.legifrance.gouv.fr/juri/id/JURITEXT000030600444/ [Accessed on 15th May 2023].
[22] Herbert Smith Freehills. (2016). *A law on immunity from enforcement in France*. Herbert Smith Freehills. Retrieved from https://hsfnotes.com/publicinternationallaw/2016/12/01/a-law-on-immunity-from-enforcement-in-france/ [Accessed on 15th May 2023].

It is imperative to understand the application of French law especially in relation to the enforcement of state assets as the Claimants are presently eyeing to enforce the purported Final Awards in France.

Nonetheless, to date, Malaysia has yet to indicate any stance towards the United Nations Convention on Jurisdictional Immunities of States and their Property 2004 (which is yet to be in force), to which France has ratified. Neither does Malaysia codified any equivalent domestic state immunity legislation. However, our court have consistently affirmed the application of restrictive doctrine of sovereign immunity in Malaysia through the corpus of local case laws.

Conclusion

In his concluding remark, Datuk Tengku Fuad posed an interesting yet thought-provoking question to the panel inviting their views on whether the seamless strategy of the self-proclaimed Claimants to enforce the defective Final Award in any of the signatory states evinced an infirmity of the Convention.

It is irrefutable that the purported Final Award against Malaysia is now the second largest arbitral award ever issued against a sovereign state. The recognition and enforceability of the purported Final Award is highly contentious *vis-à-vis* the absence of an arbitration agreement and the multiple ambiguities encapsulated within the 150-year-old contract. In furtherance, the action of Dr. Stampa in relocating the seat of arbitration from Madrid to Paris is likewise preposterous and vexatious. On a larger scale, this Sulu case has placed Malaysia's sovereignty at stake, and brought upon a spectrum of repercussion. Therefore, any recognition and enforcement of the purported Final Award will open a floodgate in allowing State assets to be easily seized pursuant to the Convention.

In view of the above, it is worthy to undertake an overriding consideration on the roles of the third-party funder in this dubious proceeding. Clearly, without the pecuniary support of a third-party funder, the Claimants could not have reached thus far in pursuing their claims. The dispute might have been halted following the dismissal of application by the UK's FCO. Perhaps, the time is ripe to reconsidered if third party funding should be regulated as part of the ongoing commitment to address the shortcomings of the Convention.

SESSION 3: ABUSE OF ARBITRAL PROCESSES[23]

Moderator:
Dato' Firoz Hussein bin Ahmad Jamaluddin (Partner, Messrs Firoz Julian)

Panellists:
1. **Professor Robert Volterra** (Partner, Volterra Fietta and Visiting Professor of International Law at University College London, University of London)
2. **Dr. Stephan Wilske** (Partner, Gleiss Lutz and Vice President of the CAAI Court of Arbitration)
3. **Mr. Roger Chin Ken Fong** (President, Sabah Law Society and Partner, Messrs Chin Lau Wong & Foo)

Definitions of Abuse of Process

The session began with an interchange and perspective on the definitions of "*abuse of the arbitral process*". The Panel mentioned that *abuse of process* in arbitration generally refers to an otherwise legal procedure in arbitration used to achieve fraud.

Due cognizance ought to be given to the fact that arbitral tribunals have explicitly recognized that all systems of law, whether domestic or international, adopt the principle of abuse of rights, or similar concepts, to preclude the misuse of the law[24]. The abuse of process generally denotes the use of procedural rights for a purpose other than that for which such procedural rights were established[25].

The panel discussed how the concept of abuse of process relates to the principles observed in arbitration. Dr. Stephan Wilske mentioned that the principle of abuse of process relates to the observance of good faith principles and contemplates the use of procedure as a vessel with content to achieve a result.

Mr. Roger Chin mentioned another general principle which correlates to the abuse of process, namely adhering to the applicable rules of the procedure. He contextualized that within the Sulu case, flagrant abuse of process was illustrated at every level and the arbitrator clearly deviated from the principles of arbitration by cherry-picking Spanish law i.e., the arbitrator favoured Spanish law upon appointment but later rejected it when his appointment was annulled.

[23] Rapporteurs in session: AIAC Case Counsel, Sharifah Shazuwin Binti Syed Sheh and Sapienza Jazmin Alejandra (reviewed by AIAC Case Counsel, Kho Yii Ting).
[24] *Mobil Corp. v. Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction dated 10th June 2010, paras. 169-172.
[25] Emmanuel Gaillard. (2017). "Abuse of Process in International Arbitration", 32 ICSID Review 17, p. 17.

Alleged Arbitration Agreement

The Panel shared their confusion over the interpretation of the existence of an arbitral agreement in the Deed of Cession 1878 ("**1878 Agreement**"). They elaborated on how each jurisdiction may interpret an implicit agreement according to their own laws, and how defective arbitral clauses can be curable but that even after all these considerations, an arbitral agreement cannot be elucidated in the context of the Sulu case.

The purported arbitration agreement contained within the 1878 Agreement has been a subject of much discussion, including the *Government of Malaysia v Nurhima Kiram Fornan & Ors.* case before the High Court of Malaysia[26], through which an interim injunction was issued to bar the purported Claimants of the Sulu case from pursuing its claim before an arbitral tribunal.

The decision of the High Court of Malaysia also provided reasonings to deny recognition and validity to the dispute resolution provision contained in the 1878 Agreement, ascertaining that said provision cannot explicitly or impliedly be understood to reflect the consent of the parties to submit to arbitration[27].

It is logical by its own form that any arbitration clause must set forth the parties' agreement to arbitrate, they must refer to arbitration as such (not ADR or some other form of dispute resolution) and contain the element of finality[28].

The Panel also remarked that in their practice, as varied and complicated as arbitration clauses may be, they all contained at least the word "arbitration".

The existence of a binding and valid arbitration agreement is elemental to the recognition and enforcement of the award. Article II (1) and II (2) of the New York Convention refer to "arbitral agreement" and "arbitral clause", thus allowing for recognition of arbitration agreements at a domestic level, as opposed to agreements of other nature i.e., mediation, dispute resolution[29].

As often repeated, and as mentioned by Dr. Wilske, consent is the cornerstone of arbitration. This rings especially relevant to the matter of the Sulu case since under most legal systems a state's agreement to recur to arbitration constitutes a waiver of sovereign immunity[30].

As the issue of sovereignty will be addressed below, suffice it to say at this time that the dispute resolution provision established in the 1878 Agreement cannot be construed to be an arbitration agreement since it entirely lacked the above-referred qualities. Much less could it be understood to suffice as a sovereignty waiver in the context of arbitration.

[26] [2020] MLJU 425.
[27] *Supra*, para [12](f).
[28] Born, G. B. (2021). *International Arbitration: Law and Practice*. Kluwer Law International B.V. At p. 38.
[29] *Supra*, p. 56.
[30] *Supra*, p. 15.

Non-arbitrable Matters: Sovereignty and Immunity in the International Commercial Arbitration

The Panel remarked on the requirement of express agreements when issues of sovereignty are involved. They questioned the arbitrator's application of the UNIDROIT Principles of International Commercial Contracts over findings based on a transfer of sovereignty. The Panel noted that the arbitrator seemed to have understood the matter to be commercial, but applied matters of sovereignty. The two are not necessarily connected but the Panel highlighted the need for arbitral tribunals to consider every element of the relationship between the parties, both sovereign and commercial.

1) Issues of Sovereignty in the Context of International Commercial Arbitration

One of the main components of the Sulu dispute centers on the claim of the allegedly non-paid rent amounts under the 1878 Agreement. This is closely linked to a point of contention between the Parties in the nature of the 1878 Agreement. The self-proclaimed heirs alleged that the 1878 Agreement constituted a commercial land lease between the Sultan of Sulu and private individuals.[31] On the other hand, Malaysia sustained that the 1878 Agreement was a non-commercial instrument for the permanent cession of territorial sovereignty over certain territories of North Borneo by the Sultan of Sulu.[32]

The purported Final Award however took the view of the heirs[33]. Thus, Dr. Stampa proceeded to apply the Principles of International Commercial Contracts endorsed by the International Institute for the Unification of Private Law ("**UNIDROIT Principles**") to the present Sulu case[34].

The panel of Speakers had interesting views on this subject. Professor Volterra highlighted that the qualification of the present dispute as commercial is one of the most worrying aspects of the present Final Award. He remarked on the confusion brought forward by the application of the UNIDROIT Principles, which were first released in 1994, to a colonial agreement from 1878 which clearly does not perform as a normal tenant-landlord relationship.

Dr. Wilske reflected his view that the boundaries between what constitutes a commercial dispute versus a public international law dispute can sometimes be blurry. However, he proceeded to underline the special nature of the Sulu Case, and that it, in fact, contains elements of public international law.

Mr. Roger Chin categorically rejected the treatment of the Sulu Case as a commercial dispute.

[31] *Nurhima Kiram Fornan & Others vs Malaysia*, Final Award dated 28th February 2022, para 186.
[32] *Supra*, para 187.
[33] *Supra*, paras 212 - 222.
[34] Supra, para 69.

The speakers remarked that at no time did Malaysia renounce its sovereign immunity. One of the most worrisome aspects of the present award is how it potentially undercuts Malaysia's application of its own sovereign powers. In this context, Article 17 of the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI) of 2004 (yet to enter into force) only provides for a waiver to state immunity from a foreign court's supervisory jurisdiction on questions relating to arbitration. Such a limitation is confirmed by Articles 18(a)(ii) and 19(a)(ii) of the UNCSI, which required an express consent (contained in the arbitration clause or in a written contract) by the foreign State to the taking of measures of execution or provisional measures on its properties.

The above instrument confirms the high importance of written consent when dealing with matters of such transcendence. Even if one is to consider the existence of commercial elements in the 1878 Agreement at issue, and the words of Dr. Wilske reverberate on this point, the aspects of sovereignty which color the present dispute cannot be ignored. Even more, the absence of an express renunciation to sovereign powers, by way of a proper arbitral clause or otherwise, needs to be respected.

Many judicial and legislative decisions point towards an emerging outline: a slow but steady reduction of the deference to state sovereignty under circumstances in which a government or its instrumentality has voluntarily committed itself to arbitration, then it is expected that legislation and judicial decisions follow suit to reduce deference of state sovereignty[35].

This is clearly not applicable to the Sulu case. At no point did Malaysia renounce its sovereign immunity, and for that matter, the dispute settlement provision contained within the 1878 Agreement cannot be construed to be an arbitration agreement.

The Arbitrator's choice to ignore the modern international commercial law (and widely agreed upon) elements of an arbitration clause, while at the same time choosing to apply modern international commercial law instruments such as the UNIDROIT principles to a dispute that is heavily nuanced by the issues of sovereignty and public international law could translate into dangerous precedent for State litigants in arbitration.

2) Abuse of Procedure as a Tool to Threaten Sovereignty

One of the stand-out moments of the Panel came in the shape of a resolute "YES" to the question of whether an arbitration procedure can be abused to the point of threatening a state's sovereignty.

[35] Reisman W. M. (2002). *Dallas Workshop 2001: International Arbitration and Sovereignty. International Arbitration*. Oxford University Press, Vol. 18(3), p. 236. Retrieved from https://www.kluwerarbitration.com/document/new-ipn24532?q=sovereignty [Accessed on 12th May 2023].

Mr. Roger Chin pointed out that the Arbitrator in the Sulu case justified his "cherry picking" and subsequent change of venue for the arbitration to prevent a "denial of justice"[36]. The Panel expressed their collective confusion at the misapplication of the international public law figure in the case at hand, which has been treated as a private international law matter.

Sufficient material exists regarding the abuse of local courts' authority to interfere with arbitrations. A controversial case in this sense is *Saipem v. Bangladesh*[37]. In this decision, the arbitral tribunal, which had been constituted under the auspices of the ICC to hear the dispute between a Bangladeshi statutory corporation and an Italian contractor, had its authority revoked by the courts of Bangladesh, the seat of the arbitration on the basis of an alleged misconduct from the arbitrators and that there was "a likelihood of miscarriage of justice" should the arbitration be allowed to go forward[38].

Nevertheless, the tribunal decided to continue its proceedings. When the arbitral panel issued a final award, it was considered as *non-existent* by the Supreme Court of Bangladesh[39].

A claim was later raised before the ICSID in light of the Italy-Bangladesh BIT. The ICSID tribunal acknowledged that national courts may have the right to revoke arbitral tribunals' authority in cases of misconduct, and that courts are bestowed with a discretionary power in this regard[40], the tribunal found that such a discretionary power has been exercised for a purpose other than that for which it was conferred, and thus violated the internationally accepted principle of the prohibition of abuse of rights[41].

The present case points towards a local court that was found to have abused its powers and authority under an internationally recognized principle of law. It is one of the numerous cases where a State misapplied its sovereign powers.

However, the Sulu case presents a very unique turn of the table, where Malaysia is faced with a severe undercutting of its powers. The so-called heirs of the Sultan Sulu sought to abuse the present arbitral process, abuse the Spanish laws and courts, and now they seek to abuse the French laws and courts in order to prompt an inappropriate and illegal exercise of jurisdiction over Malaysia.

[36] *Nurhima Kiram Fornan & Others vs Malaysia*, Final Award dated 28th February 2022, paras 142-143.
[37] *Saipem S.P.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Final Award, (June 30, 2009), Retrieved from https://www.italaw.com/cases/951 [Accessed on 13th May 2023].
[38] *Supra*, para. 34.
[39] *Supra*, para. 171.
[40] *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction, para. 159, (21st March 2007), Retrieved from https://www.italaw.com/cases/951 [Accessed on 13th May 2023].
[41] *Supra* 9, para. 161.

The consideration that the present dispute is rooted in a valid and binding arbitration agreement, and that by signing such an agreement Malaysia waived its sovereign immunity, should be considered as a serious peril to state sovereignty. The courts being presented with a request to recognize and enforce the purported Final Award will be tasked with analyzing the potential repercussions.

Limitation to the Doctrine of *Kompetenz-kompetenz*

Kompetenz-kompetenz is the quintessential principle dealing with the allocation of jurisdiction between the state courts and the arbitral tribunals. First, it addresses the ability of tribunals to rule on their own jurisdiction and, second, whether and to what extent the tribunal's decision is binding on the state courts[42].

The Panel observed that for the *Kompetenz-kompetenz* principle to operate, there must first be a properly constituted tribunal.

In the context of the Sulu case, the relevant courts have already addressed this matter. Via the Judgment of the Superior Court of Justice of Madrid dated 29th June 2021, the improper service of the notice of arbitration was construed to be a procedural infraction resulting in Malaysia's defenselessness[43]. The Court remarked that this irregularity also extended to the appointment of the arbitrator[44].

The arbitrator opted to continue proceedings in spite of the above decision and the order to stop and close the procedures immediately[45].

The Panelists further mentioned how the tribunal may have the first say on matters of competence, but the final say comes from the Courts. The *Kompetenz-kompetenz* principle is generally reflected in practice by way of the tribunal's consideration and ruling upon jurisdictional challenges, subject to at least a measure of subsequent judicial review of the decision.[46]

[42] Balthasar, S. (2016). International Commercial Arbitration. A Handbook: International Conventions, Country Reports and Comparative Analysis. Bloomsbury. At p. 20.
[43] Judgment of the High Court of Justice of Madrid dated 29th June 2021, para 30. Retrieved from https://jusmundi.com/en/document/decision/es-nurhima-kiram-fornan-fuad-a-kiram-sheramar-t-kiram-permaisuli-kiram-guerzon-taj-mahal-kiram-tarsum-nuqui-ahmad-narzad-kiram-sampang-jenny-ka-sampang-and-widz-raunda-kiram-sampang-v-malaysia-sentencia-del-tribunal-superior-de-justicia-de-madrid-tuesday-29th-june-2021#decision_20263 [Accessed on 14th May 2023] (Note that translation is our own).
[44] *Supra*, para 22.
[45] See footnote 28, para 116.
[46] See footnote 31, p. 63.

In this sense, on 13th October 2021 the High Court of Madrid decided that the Preliminary Award on Jurisdiction made by Dr. Stampa on 25th May 2020 is null and void following the High Court of Justice Madrid decision on 29th June 2021. The choice of the Arbitrator to continue the process in spite of this, brings forth the reasonable endangerment of the recognition of the award as valid.

The decisions issued by the Spanish courts would serve as a clear indication to other courts confronted with the recognition and enforcement of the award, that the Arbitrator surpassed his limits of competence, and refuse its application.

They further expanded on the disregard for the Spanish court decisions displayed by the arbitrator in the Sulu case.

Denial of Justice as a Weak Basis to Shift the Seat of Arbitration

Denial of justice as a basis to shift the seat of arbitration is found in the French legal system. The 2011 Decree[47], which regulates domestic and international arbitrations in France, enshrined in particular the role of the French judge to act in support of arbitration. This role is known as '*juge d'appui*', which literally translates as 'judge of support' or 'supporting judge'.

The French supporting judge's role in domestic and international arbitrations is to facilitate arbitration proceedings and to settle the possible difficulties during such proceedings. The French supporting judge's role, namely its universal jurisdiction to intervene in support of arbitrations where one of the parties faces a risk of 'denial of justice', even in cases having no link with France[48]. Case law shows that this authority, which may seem surprising at first glance, is an efficient tool for foreign parties to avoid denial of justice.

Various issues may indeed arise at the stage of the constitution of the arbitral tribunal, especially in *ad hoc* arbitrations where no, or incomplete, appointment procedures have been agreed upon, or when the chosen appointing authority fails to perform its functions. Qualified by some scholars as a "forum of necessity", the French supporting judge offers a unique recourse to parties facing a deadlock in their arbitration proceedings that may lead to a denial of justice.

Thanks to its broad jurisdiction, finding its roots in the landmark *NIOC v. State of Israel* case, the French supporting judge may serve as a safety valve for foreign parties as it may assist to resolve deadlock situations affecting arbitration proceedings, regardless of whether they have links to France.[49]

[47] Decree No. 2011 - 48 of 13 January 2011 (reforming the law governing arbitration). Retrieved from http://parisarbitration.com/wp-content/uploads/2017/02/EN-French-Law-on-Arbitration.pdf [Accessed on 29th May 2023].
[48] The role and powers of the supporting judge in domestic arbitrations are regulated by Articles 1451 to 1457, 1459, 1460 and 1463 of the French Code of Civil Procedure. By virtue of Art. 1506 of the French Code of Civil Procedure, Articles 1452 to 1458, 1460 and para. 2 of Article 1463 are also applicable to international arbitrations.
[49] *National Iranian Oil Company (NIOC) v The State of Israel*, ICC. Retrieved from https://www.italaw.com/cases/4411 [Accessed on 14th May 2023].

The Panel discussed that it is an anomaly for an arbitrator to shift to a different jurisdiction after the previous appointment was nullified. It was highlighted that the arbitrator attempted to justify it as a denial of justice when his appointment was revoked. This eventually constituted a weak basis for the shift in the seat of arbitration.

The moderator pointed out the next step for parties is the inevitable enforcement and setting aside applications for the Final Award and asked the views of the Panel. All three speakers concurred that it is not necessary that if the Final Award is set aside at the seat, then the award is annulled automatically despite that it is an outlier.

Consequences to the Final Award

A query was raised by the audience on the enforcement and setting aside procedures under the New York Convention 1958. Dr. Wilske recommended that unless and until the Final Award is nullified at the seat i.e., the French court, the State is urged to continuously campaign and raise awareness on the consequences through media. This will increase the chances of Malaysia's arguments and standpoints being heard as it is always a risky choice of refraining from participating in arbitration.

The panel further pointed out it might be worth exploring further is whether this Sulu dispute resembled one of those sham arbitrations. In sham arbitration, the parties often collude in filing a fraudulent case based on fabricated facts for evading obligations or other illegalities such as money laundering. Due to the widespread of party collusion and the confidentiality of arbitration, sham arbitration is becoming more challenging for the courts or infringed third parties to discover. Certainly, some arbitration institutions review the final award before authenticating for its enforceability, which allows more opportunities to identify any undesired occurrence of sham arbitration.

For example, in the arbitration instituted by CIETAC, the arbitral tribunal was required to submit its draft to CIETAC for scrutiny before the latter approved the award. 'CIETAC may bring to the attention of the arbitral tribunal issues addressed in the award on the condition that the arbitral tribunal's independence in rendering the award is not affected'. Thus, the scrutiny of arbitration institutions at least allows one or more opportunities to identify sham arbitration. However, there is not such a similar chance for *ad hoc* arbitration as it is 'unadministered' and fall beyond the purview of the arbitral institutions.

Consequences to the Arbitrator

Professor Volterra pointed out that a tort of misfeasance against an arbitrator is not an anomaly but rarely States will submit themselves to the jurisdictions of courts because it will eventually constitute a waiver of their sovereignty. Pertinently, the panel discussed how the consequences of the arbitrator's actions during the conduct of proceedings may range from the filing of complaints with the arbitrator's associations and/or affiliations i.e., Chartered Institute of Arbitrator (CIArb), to instituting criminal action.

Professor Volterra highlighted the effects of gaps between the appointment and re-appointment of the tribunal and that was sufficient to take into consideration the weight of the consequences. Dr. Wilske added that associations have sanctioned counsel for breaching ethical and social codes and penalised accordingly but did not provide further details as it rarely happens.

CONCLUDING REMARKS

We had the opportunity to hear from leading experts in the legal fraternity – not just in our region but internationally - examining in detail a case that has had an extraordinary impact on Malaysia – the Sulu matter. The facts are straightforward – the Government of Malaysia is facing ongoing litigation across Europe in response to the Sulu claimants and purported Final Award which was issued in February 2022. It is the Government of Malaysia's case that the purported Final Award should be null and void – there is no arbitration clause in the agreement which the Sulu claimants rely on, Malaysia has not waived its sovereign immunity in the proceedings. Over 16% of Malaysia's yearly budget is now at stake. Malaysia completely rejects the award, does not recognise its legitimacy, and is litigating across Europe to ensure that the award is overturned.

However - the purpose of the Colloquium was not to explain the Government of Malaysia's response to the Sulu matter. Instead, it aimed to bring together the foremost voices to discuss the interesting and difficult issues that the case brings to light – ranging from the sovereign immunity question to reviewing procedural irregularity including the movement of the arbitration seat from Madrid to Paris. One thing that should be in no doubt during the discussions was Malaysia's respect for international law and the critical importance of the international arbitration system in providing an effective dispute resolution mechanism. International law is the glue that holds together the different systems and norms in countries around the world – a common rulebook for sovereign states abides by. The enshrined global system of treaties, conventions, and norms has a daily impact on people everywhere. This should at no point be taken for granted or overlooked. It is the result of many decades of co-operation between nations.

In the same vein, and as demonstrated during the Colloquium, Malaysia is a committed proponent of the arbitration system, that allows for neutral, private, effective, and typically expedient outcomes than domestic court proceedings, with judgements that are respected worldwide. The fact that the Sulu matter is the result of the international arbitration system in no way changes Malaysia's outlook on this vital mechanism for dispute resolution. Instead, it reinforces the understanding and appreciation that the Sulu case represents a sophisticated abuse of arbitral process and international law. The conversation during the Colloquium comprising academicians, legal practitioners, and experts from different domains illuminate us with valuable insights on matters pertinent to the subject matter from different perspectives in promoting and facilitating informed discourses on the Sulu case within the arbitration community as well as the public at large as the Sulu case runs its course.

[End of Report]