International Commercial Arbitration in Malaysia

1-1 Pre 2006 Legislation

1. Malaysia was a British dominion until 1957. The laws in Malaysia pre-independence and much of the laws todate are founded on the principles of English common law. English common law has historically recognized the right of parties to a private arbitration and a legislative framework has been put in place since the eighteen hundreds.

2. Historically in Malaysia, there was no specific enactment dealing with the arbitration process until 1912. Prior to 1912, the English implemented civil procedure code provided for arbitration processes in certain circumstances and for certain disputes. There were other legislation relating to companies or land, which contained particular provisions prescribing the resolution of specified disputes by way of arbitration. Through these early legislative modes, the arbitration forum was given the force of law. However true party autonomy was not recognized at that time.

3. In 1912, an arbitration enactment modeled on the English Arbitration Act 1889 was introduced and made applicable to a number of states (districts) within Malaysia which then were under the direct control of the British (referred to as the Federated States, the other states being still under direct control of the

rulers). Soon thereafter, some of the un-federated states in Malaysia adopted the enactments likewise. Eventually when the Federation of Malaya was formed in 1948 (all states unified except for Sabah and Sarawak), this early enactment was extended to the Federation and became the Arbitration Ordinance of 1950.

4. In 1950, Britain enacted a new legislative framework that to some extent gave rise to the recognition of respect for party autonomy by reducing the curial powers. This enactment was to later become the cornerstone of Malaysia's arbitration laws until very recently (in fact it still is but a new legislation has been passed by Parliament and is intended to be put into effect in the very near future).

5. A similar enactment *in pari materia* to the British Arbitration Act 1950 was first introduced and enacted in one particular state of Malaysia namely Sarawak[1]. By 1972, the independent Parliament of Malaysia extended the said legislation and made it applicable to all the states that make up Malaysia[2] today. Whilst to some extent it did recognize party autonomy, the enactment was drafted during the first half of the 20th century and therefore did not cater or envisage the need for a distinction between international and domestic arbitrations. Although the arbitration process and its outcome were given the force of law, there were still extensive curial provisions ensuring supervision through various prescribed forms of court intervention.

[1] Ordinance of Sarawak (Cap 45)
[2] Arbitration Act 1952

6. Therefore historically, legislation in Malaysia relating to arbitration was never evolved independently but instead has been influenced *in toto* by the United Kingdom and more specifically England.

7. As a member of the United Nations and other international organizations, Malaysia was later influenced by various conventions to recognize the necessity for total or full party autonomy in arbitrations (except for enforcement purposes) where international non-Malaysian parties were involved. Total or full party autonomy was deemed as being synonymous with minimum local judicial supervision and intervention.

8. In 1966, Malaysia enacted a legislation to put into force the articles on the *Convention of the Settlement of Investment Disputes between States and Nationals of other States* ("the Washington Convention)[3]. After 1977, when the General Assembly of the United Nations had adopted the recommendation that the United Nations Commission on International Trade Law Arbitration Rules 1976 (UNCITRAL Arbitration Rules) be used for the settlement of disputes relating to international commercial relations and contracts, Malaysia as a member of the Asian-African Legal Consultative Committee (AALCC) came to an agreement with its fellow members in 1978 whereby one of the two regional centers for arbitration was to be set up in Kuala Lumpur (KLRCA) (the other being in Cairo, Egypt). It was agreed that the KLRCA would adopt the UNCITRAL Arbitration Rules as its procedural rules. Accordingly in 1980, Malaysia then put into place the necessary amendment to its existing legislation so as to provide full autonomy to arbitrations held using the KLRCA Rules (effectively UNCITRAL Arbitration Rules)[4]. In 1985,

[3] Convention on the Settlement of Investment Disputes Act 1966
[4] Section 34 Arbitration Act 1952

Malaysia enacted a legislation to put into force the articles on the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("the New York Convention")[5] and accordingly amended its existing legislation to allow the enforcement of UNCITRAL awards within Malaysia.

9. The various amendments made by Malaysia to its legislation between the years 1966 till 1985 which tantamount to Malaysia's recognition of full autonomy for international arbitrations was however limited to the ambit of the specific conventions adopted by Malaysia. Full autonomy was granted only to arbitrations involving disputes arising from investments where at least a convention member State/Country (or an agency representing the State/Country) was a party and the arbitration is conducted at the International Centre for Investment Disputes (ICSID) (later the KLRCA was also declared as an alternative venue to ICSID) and for arbitrations held under UNCITRAL Arbitration Rules and the KLRCA Rules (the word "*and*" was used in the legislation thus limiting the scope effectively to only arbitrations held under the KLRCA Rules).

10. The resultant effect was that full autonomy was not rendered to a large number of international arbitrations held in Malaysia including those held under the auspices of popular international institutions such as the ICC. Further, the amendments to the legislation that provided full autonomy did not cater for ad-hoc international arbitrations held under the UNCITRAL Arbitration Rules (except for enforcement purposes) unless the same was effectively held under the KLRCA.

[5] Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985

11. There was also confusion as to whether the legislative provision rendering full autonomy by virtue of the arbitration being held under the UNCITRAL Arbitration Rules and the KLRCA Rules would only apply to an "international arbitration". Initially the KLRCA Rules[6] did draw the distinction between international and domestic arbitrations by suggesting that the full autonomy did not extend to domestic arbitrations. However, the later revised KLRCA Rules[7] withdrew this distinction.

12. Whilst initially the Malaysian Courts construed this full autonomy as limited to international arbitrations, by 1997 the Malaysian Courts had declared that the full autonomy applied to both international and domestic arbitrations providing the arbitration was held under the KLRCA Rules (the effect was thus beyond the purposes for the setting up of the KLRCA)[8].

1-2 Current 2006 Legislation

13. Since the late 90s, there have been calls from local institutions in Malaysia for the legislature to amend the legal framework by adopting the UNCITRAL Model Law on International Commercial Arbitrations (Model Law) with some modifications thereby ensuring full autonomy and limited court supervision over international arbitrations regardless of whether it is an institutional or an ad-hoc arbitration and regardless of the prescribed rules governing the conduct of the arbitration.

[6] January 1998 Edition
[7] August 2001 Edition
[8] Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd [1997] 2 MLJ 280, [1998] 2 MLJ 20, Jati Erat Sdn Bhd v City Land Sdn Bhd [2002] 1 CLJ 346

14. The Malaysian Bar Council Arbitration Sub-Committee presented its draft legislation to the authorities (Attorney General's Offices) in 2002. The approach in the draft was in line with the Model Law and effectively was a single legislation covering both domestic and international arbitrations but with 2 regimes within the said legislation, one for international arbitrations and another principally for domestic arbitrations which allowed for certain more curial supervisory provisions. However, premised on the principle of ensuring party autonomy, an opt-in (for international arbitrations) and an opt-out (for domestic arbitrations) entitlement in respect of the more curial supervisory provisions were given to both regimes. Whilst the Model Law was developed for international commercial arbitrations, many aspects of the Model Law was found equally suitable for the domestic regime and hence recommended.

15. On 31.12.2005, a new legislation reforming the legal framework for arbitrations in Malaysia was introduced[9]. It has been gazetted but has yet to take effect (the date of effect has yet to be determined).

16. It effectively adopted the approach recommended by the Bar Council with a single legislation covering 2 separate regimes, one for international and one for domestic arbitrations together with the opt-in and opt-out entitlement attached to the more curial supervisory provisions. There are however some modifications in the new legislation compared to the draft proposed by the Bar Council Arbitration Sub-Committee.

[9] Arbitration Act 2005

17. Under the new legislation, international arbitration is defined in accordance with the Model Law and as such, there is no longer any distinction given to arbitrations that are held under the KLRCA Rules. In this new legislation, the Model Law has to a large extent been adopted and applied to both the international and the domestic regimes, with some notable modifications. Additional provisions that provide for curial powers by way of court supervision and interventions are deemed only applicable to domestic arbitrations but with an opt-out entitlement (the need for expressly drafted in the arbitration agreement) given to domestic parties and an opt-in entitlement (the need for expressly drafted in the arbitration agreement) given to international parties for either the entire or any part of these other provisions.

1-3 Court Intervention

18. Under the old legislation[10] and regardless of whether it was an international or domestic arbitration, the Malaysian Court was empowered to extensively intervene in the arbitration process as well as exercise curial powers over the arbitration award. The more extensive powers include:-

> a case stated procedure whereby questions of law could be referred to the High Court for determination prior to or during the arbitration process (with the ensuing delays);

[10] Under Malaysian Arbitration Act 1952

the power to review arbitration awards for an error of law on the face of the award (with the ensuing problem that at times even the supposed error in the arbitrator's evidential appreciation of facts was deemed an error of the law of evidence) and the power to remit the award back to the arbitral tribunal for re-consideration premised on the court's view;

the power to set aside the award where an arbitrator had mis-conducted himself, albeit a technical misconduct;

the power to revoke the arbitrator's authority and order that the agreement to arbitrate shall cease to have power if the disputes involve a question of whether any party has been guilty of fraud (normally applicable only at the option of the accused party);

the right for the parties to appeal to the Court of Appeal on any of the High Court's determinations pursuant to its curial powers.

19. There are numerous occasions where the High Court or the Court Appeal have remitted or set aside arbitration awards, whether international or domestic. However, the revocation of the arbitrator's powers where there is an issue of fraud arising, has been used sparingly but there has been at least one occasion where this has been so ordered[11].

[11] Bina Jati Sdn Bhd v Sum – Projects (Bros) Sdn Bhd [2002] 2 MLJ 71

20. By virtue of the amendments to the old legislation which arose from the international conventions[12], the Court's curial and intervention powers were completely excluded for arbitrations held at ICSID and for arbitrations held under the UNCITRAL Arbitration Rules and the KLRCA Rules.

21. In respect of the Court's curial powers to grant interim preservation orders, under the old legislation as well as the new legislation, the High Court has continued to be empowered to grant a variety of stipulated preservation orders. These powers in any event have been construed as not being an interference with the arbitration process but in fact a means of reinforcing and making effective any determination in an arbitration. Such powers do not directly interfere with the subject matter of the arbitration, but are seen as being in assistance to the arbitration process.[13] The Model Law in fact takes the same view.

22. Under the new legislation as with the Model Law, certain curial powers continue to remain in existence albeit limited in nature. These are namely in situations:-

> where the appointment of an arbitrator can be challenged on limited grounds namely on the basis of doubts as to his impartiality or independence or his lack of qualification. There is however no right of appeal beyond the High Court;

[12] Section 34 Arbitration Act 1952
[13] Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] 1 All ER 664
Thye Hin Enterprise Sdn Bhd v DaimlerChrysler Malaysia Sdn Bhd [2005] 1 MLJ 293

where an arbitrator can no longer act or fails to act without undue delay and there is a disagreement by the parties on whether to terminate his mandate;

where there are determinations by the arbitrator or the arbitral tribunal on issues relating to his (their) lack of jurisdiction. There is however no right of appeal beyond the High Court;

where an award has been issued and there is an application to set aside the award but only limited to the following circumstances:-

> where the party to the arbitration was under any incapacity; or
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> where the arbitration agreement is not valid under the applicable law or if none, Malaysian law; or
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> where there has been no proper notice given to the applying party of the arbitration proceedings or the said party was otherwise unable to present its case; or
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> where the award deals with disputes that do not fall within the ambit of the arbitration agreement; or
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> where the award contains decisions on matters beyond the scope of the submission to arbitration; or
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> where the composition of the arbitral tribunal was not in accordance with the parties' agreement; or
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> where the subject matter of the dispute is not capable of being determined by arbitration under Malaysian law or the award is in conflict with public policy in Malaysia (which has been expressed as inclusive of situations where the award was

induced or affected by fraud or corruption or where there is a breach of natural justice);

where the award is sought to be recognized and enforced in Malaysia (the recognition and enforcement is now limited to domestic arbitrations and awards from the contracting countries to the New York Convention), the High Court can refuse to enforce the award on the same grounds as that stated above in paragraphs 22.4.1 to 22.4.7 or additionally on the ground that the award has yet to become binding or has been set aside or suspended by the court of the country in which the award was made or by the court of the country where the applicable law is derived.

23. Under the new legislation, the above quoted powers are the only curial powers of intervention granted to the Malaysian Court that are applicable to international arbitrations (unless the parties opt to include the further provisions in the legislation which provide further curial powers, by expressly stating so in their arbitration agreement).

24. For domestic arbitrations, in addition to the above curial powers, the Malaysian Courts have been empowered with far more substantive curial powers (unless the parties opt out of these further provisions by expressly stating so in their arbitration agreement). However in comparison with the old legislation, the further curial powers have been better expressed with clarity and some powers have been excluded. These further curial powers are as follows:-

instead of a case stated procedure, the High Court is now empowered to determine a preliminary point of law but only with the consent of the arbitral tribunal or the parties and only if it is likely to produce substantial savings in cost and will substantially affect the rights of one of the parties;

upon issuance of an award, the High Court is only empowered to determine questions of law arising out of the award and accordingly is empowered to remit or set aside the award. Additionally, the High Court is now further empowered in such a situation, to vary the award.

25. The power to vary an award is unique and it is uncertain in what type of circumstances the Malaysian Courts will exercise such a power. There has already been one occasion where the Malaysian Courts have effectively varied an arbitration award albeit in a limited fashion and for an exceptional reason (although no such power was expressed under the old legislation). The Malaysian Court of Appeal exercised this power where there were no other options available to the Court as the single arbitrator had since passed away and the award had to be varied to ensure justice was done because the arbitrator had failed to address the claim on pre-award interest which in normal circumstances would have been remitted for re-consideration before the arbitrator. In such a circumstance, the Malaysian Court of Appeal relied on its inherent jurisdiction and its other powers expressed in other legislations specifically in relation to the power to grant interest, so as to effectively vary the award by ordering that the award is deemed to carry the additional interest sought by the party at the arbitration[14].

[14] Leong Kum Whay v QBE Insurance (M) Sdn Bhd [2006] 1 AMR 668

1-4 Disputes Referable to Arbitration

26. Under the old legislation, there were no express provisions defining what disputes could or could not be referred or submitted to arbitration. The Malaysian Courts have however placed certain limitations on the type of disputes that could be referred or submitted to arbitration. Disputes that involved public interest elements were excluded and these included disputes relating to citizenship, the legitimacy of marriage, divorce, parent and child relations, the granting of statutory licences, the registration of trademarks and patents, copyrights, the winding up of companies, bankruptcy, anti-trust, trade practices, consumer protection, environmental protection, planning, the employment of certain categories of employees, criminal charges and any action *in rem* against vessels.

27. The old legislation did however give the Malaysian Courts the power to refuse to stay proceedings brought to the court in breach of an agreement to arbitrate, if the dispute involved a question of fraud (normally exercised only if the accused party seeks to maintain the action in court). So whilst disputes involving a question of fraud could be referred to arbitration, the Court had the option not to enforce the arbitration agreement in such a situation.

28. Under the new legislation, any disputes that have been agreed by the parties as disputes that are to be submitted to arbitration, are deemed disputes referable to arbitration. The only proviso is if the arbitration agreement is contrary to public policy.

29. As a further clarification, the new legislation explicitly states that if any other statute confers jurisdiction to the Courts to determine disputes arising there from, without mentioning of arbitration, this will not be deemed as preventing the disputes arising there from to be referred to arbitration if the parties so choose (ie. not against public policy).

30. It is believed that disputes which would be deemed contrary to public policy, may be similar to those previously construed as being disputes involving public interest elements. However the category of disputes that could fall within this ambit is not exhaustive. There is obviously fear that this entitlement could be extended to include nationalistic and protective policies but the judiciary must be made aware that Malaysia's economy is very much dependent on foreign investments and such interpretation will only be defeatist.

31. Under the new legislation, the Malaysian Courts have been given the express power to consider whether a dispute does in fact exist, before it can cause a dispute to be referred to arbitration. This power was implied under the old legislation as well.

32. Under the old legislation, the Malaysian Courts have been extremely cautious in coming to any conclusion that there is no dispute between the parties. The Malaysian Courts have refused to carry out any critical examination of the merits of the claims between the parties and have refused to examine the *bona fides* of the disputes. As such, it was construed as a power that could only be exercised where there was clearly no dispute on the face of the claims.

33. It is uncertain whether the Malaysian Courts would continue to take this cautious approach in exercising this particular power especially as it has now expressly been given the power to decide under the new legislation and no longer has to imply this power.

1-5 Arbitrators

34. Both the new and old legislation continue to maintain the parties' right to determine the number of arbitrators. However, if there was no determination by the parties, then under the old legislation it was deemed a reference to single arbitrator. Under the new legislation and for an international arbitration, it is deemed to be a reference to 3 arbitrators whilst for a domestic arbitration, it is deemed a single arbitrator.

35. In the event the appointment of the arbitral tribunal cannot be resolved through the procedures provided for by the arbitration agreement and if the parties fail to provide for an appointing authority, then under the old legislation, the appointment was determined via the High Court. Under the new legislation, if the parties fail to provide for an appointing authority, the appointing authority is deemed to be the Director of the KLRCA, and only if the Director fails to act, the appointment will then be determined via the High Court.

36. The potential arbitrators within the KLRCA list are believed to be persons of extensive experience and are renowned as arbitrators. In fact the new

legislation stipulates that for international arbitrations, the Director of the KLRCA should consider the appointment of an arbitrator who is of a nationality other than the nationalities of the parties.

37. As for the 3rd arbitrator in an arbitral tribunal, under the old legislation and unless the parties agreed otherwise, the 3rd arbitrator if he is to be appointed by the 2 party appointed arbitrators, shall be deemed an umpire. The umpire only enters the reference if there is disagreement between both the party appointed arbitrators.

38. Under the new legislation as in the Model Law, the 3rd arbitrator is involved in the determination process from the outset because all determinations by the arbitral tribunal must be made by a majority. In fact, by the agreement of the parties or all the members of the arbitral tribunal, the 3rd arbitrator may be appointed as the presiding arbitrator to deal with questions of procedure.

39. It is common practice in Malaysia that domestic contracts tend to provide for a single arbitrator whilst international contracts tend to stipulate a requirement for 3 arbitrators.

1-6 Party Representation

40. Before the 90s' and the setting up of the KLRCA, it was commonly believed that the party representative had to be a local. For certain industries however,

such as the construction industry, it was common that other professionals could represent the parties at arbitrations.

41. In 1990 and in a case where there was an attempt to prevent a foreign attorney, the Malaysian Courts have given their support to the international arbitration process by declaring that generally in arbitrations, parties are free to be represented by persons of their own choice and this included foreign representation and representation by other non-legal professionals[15] (the case does not extend to issues relating to whether a work permit is needed. However, current practice is that no foreign attorney is ever prevented from representing a client in arbitration on the basis that a work permit is required).

1-7 Multiple Party

42. The civil procedure, as practiced in the Malaysian Courts, caters for multi party litigation by providing methods of resolving the same through means of third party proceedings within the same suit (and fourth party and so on, if necessary) or the consolidation of various court suits even the suits are commenced in various different courts (locations) of concurrent jurisdiction. The paramount consideration in the formulation of the procedures and the current implementation of the same is the substantial saving in time and money achieved by one tribunal determining inter-related disputes and most importantly, the avoidance of conflicting determinations that will surely prove to be embarrassing.

[15] Zublin Muhibbah v Government of Malaysia [1990] 3 MLJ 125

43. In relation to the arbitration process however, the old legislation was silent on whether the arbitral tribunal or the Malaysian courts were empowered to order a concurrent arbitration if the circumstances permit.

44. Arising from such legislative silence, the Malaysian Courts have tended to construe that an arbitral tribunal cannot direct a concurrent arbitration unless the parties have expressly so empowered the arbitral tribunal. The Malaysian Courts have also tended to construe itself as not being so empowered to order a concurrent arbitration even if the ensuing result was that a party would be prejudiced and deprived of justice[16].

45. There was however one occasion where the Malaysian Court of Appeal did consider the prejudices caused by a multiplicity of inter-related arbitrations and whilst it did decide that it was not empowered to order a concurrent arbitration proceedings, it commented that in such circumstances where there was a real risk of conflicting determinations which could lead to an embarrassment, by its inherent jurisdiction it was thus empowered to revoke the arbitral tribunal's powers and force the parties to commence proceedings in Court where procedures to cater for multiparty proceedings existed[17]. There has since been a reference to the Malaysian High Court on the decision and it has been found to be a non-binding comment (obiter dicta) and the Malaysian Court have refused to consider itself so empowered as suggest by the decision[18] (there has also been acceptance of this view in the Court of Appeal, although unpublished).

[16] WY Chin v Sarahon Construction Sdn Bhd [1994] CLJ 223
[17] Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd [2002] 2 MLJ 71
[18] Lingkaran Luar Butterworth (Penang) Sdn Bhd v Perunding Jurutera DAH Sdn Bhd [2005] 7 MLJ 204

46. Since it is clear that under Malaysian law, the Malaysian Courts are not empowered to order a concurrent arbitration nor are arbitral tribunals found to be so empowered without the parties agreeing so, it has come as a total surprise that in the new legislation and under the additional provisions that are only applicable to domestic arbitrations which can be opted out, and as such not applicable to international arbitrations unless opted in, there is a provision that expressly allows the parties to agree on consolidations or concurrent arbitrations or to empower the arbitral tribunal to so order.

47. The provision is likely to lead to confusion and litigation on the issue of concurrent arbitrations. The provision merely re-states the applicable position in Malaysian Law but with an option to opt-out and it is not applicable to international arbitrations. If the purposive approach to interpretation of the statute is to be taken, this can only mean that in those circumstances where the provision does not bite (ie. for international arbitrations or domestic arbitrations that have opted out), the arbitral tribunal can order concurrent arbitrations or the Malaysian Courts can order concurrent arbitrations.

48. For this particular provision, the legislative authorities clearly ignored the Bar Council's suggestion to allow an optional provision (to be opted in by the parties), which provides the converse to the generally accepted position in Malaysia law by allowing the parties the option the arbitral tribunal or the Malaysian Courts so empowered to order a concurrent arbitration. Instead the present provision in the new legislation leaves much to be desired and will require judicial pronouncements as to its effect especially when it applicability is excluded for international arbitrations or it is opted out by the domestic parties.

49. There have been a number of cases in the past ventilated in the Malaysian Courts on issues relating to or connected to the need for concurrent arbitrations. Hence it is believed that there is indeed awareness of the problems caused by the previous legislative inertia in providing guidance on the subject matter. Whilst the subject matter at first blush seems to relate only to an issue of procedure and does not affect substantive rights, it is not unfeasible that there would be circumstances whereby conflicting determinations with the possibility of appeal rights lost (where the determinations are made during different periods of time), could effectively lead to depriving a party of its substantive right to justice.

50. Examples of these situations are commonly seen in the construction industry where multiple parties are usually involved in essentially one construction project and where the conduct of one party can affect another party's legal rights without them having the privities of contract. Normally, there will be a principal party that bears responsibility and it is this principal party who is being sued by the accusing party who is likely to be in a conundrum. Without a concurrent hearing before one tribunal that hears both the accusing party's grievances and the accused party's defences, justice may not prevail. This is made more complicated when international parties are involved because the relevant personnel involved for these parties may not be within the Malaysian jurisdiction and thus cannot be compelled to attend the arbitration process as a witness.

51. The new legislative efforts indicate that the legislative is equally aware of this procedural problem, but the new legislation is only likely to lead to more controversy and uncertainty on the issue.

2-1 Acceptance in Malaysia

52. In Malaysia, arbitration has historically played an effective role as an alternative dispute resolution forum (mediation and conciliation being essentially new forums on offer). Various industries or trades have adopted the arbitration process as its effective means of resolution and the setting up of the KLRCA in 1978 has been an effective boost to the domestic acceptance that arbitration is truly an effective and supported method of dispute resolution.

53. For domestic disputes, some of the main driving factors as to why arbitration has become more popular amongst businesses within specialist industries are:-

the expediency of concluding disputes;

the less formal approach which tends to encourage settlements;

the expertise of the arbitrators in the areas of dispute which allows an expedited hearing, a proper appreciation of facts and expert evidence and as such, a more trusted outcome;

the reluctance to litigate in court, which is time consuming and lacks confidentiality and privacy.

54. Local institutions that produce particular domestic standard form contracts for particular industries or trades, such as the construction industry, the insurance industry and the international trade industry, have consistently ensured that the their standard form contracts prescribe arbitration as a forum of dispute resolution.

55. The only preventive cause thus far to domestic acceptance of the arbitration process has been the powers given to the Malaysian Courts to interfere with the arbitration process and awards in the old legislation (which suffers from drafting ambiguities resulting in liberal interpretations allowing liberal width to such powers) coupled with particular judges who have been willing to quite easily interfere with the same. The present legislative tightening of and clarity on the width of the Malaysian Court' powers to interfere in domestic arbitrations may give new-found hope that the arbitration process, whilst being a costly process will truly be an expedient and effective method of resolving disputes by being final and binding except in very clear situations. These situation can effectively be avoided subject to the quality of the arbitrator appointed.

2-2 Awareness

56. Arising from the creation of the KLRCA and the promosion of arbitration as an appropriate dispute resolution forum, there has been considerable

awareness of the existence of this alternative dispute resolution forum in particular industries and trades.

2-3 Areas of Dispute Commonly Referred

57. The largest single industry utilizing arbitration as its main forum for dispute resolution, both in the domestic and international avenues, is the construction industry. Construction disputes are almost always referred to arbitration.

58. By contrast, whilst most insurance policy standard terms tend to include an arbitration agreement (except for life, private vehicles and surprisingly, hull and marine cargo policies), domestically there has been a tendency by insurers never to insist on arbitration if the insured has sought to commence the action in the court. This is likely because the insured, whether an individual or a corporation, are always deemed to be a consumer and there seems to be an unwritten pressure from the licensing authorities for the local insurers not to insist on arbitration because of the cost effect.

59. There are other areas of dispute that have in the past few years been commonly referred to arbitration. Examples of these are :-

certain areas of intellectual property such as domain names disputes are commonly referred to arbitration. Disputes arising from the registration of the domain name under ".com" is referred to arbitration (or

mediation) at the World Intellectual Property Organization Arbitration and Mediation Centre (WIPO) (which provides for an on-line arbitration process) and under ".my" for domestic registrations, the KLRCA is utilized as the service provider for dispute resolutions under the auspices of the Malaysian Network Information Centre (MYNIC);

statutory arbitrations which are prescribed by certain legislation that govern certain classes of disputes namely in the area of trade unions, workmen compensations, co-operative societies, and disputes between liquidators and contributors of a wound up company on the sale of the shares of the company[19];

other industries that tend to involve international commerce and dealings such as international banking and finance, and maritime.

2-4 Institutionalised Arbitrations

60. In Malaysia there are permanent institutions that administrate the arbitration process. The KLRCA is the most internationally known institution and it tends to be the only known and recognized local institution handling international arbitrations.

[19] Trade Unions Act 1959, Workmen's Compensation Act 1952, Co-operative Societies Act 1993, S.270 Companies Act 1965

61. In the domestic front, there are a variety of local institutions that administrate the arbitration process. They tend to be institutions that handle disputes relating to their particular industry and even at times their particular area of trade within the industry.

62. Examples of the other institutions in Malaysia are as follows:-

in the construction industry, for normal building contracts, the Malaysian Association of Architects (PAM) issues standard form contracts that can be used for a variety of building projects and they administrate arbitrations falling within their purview. For infrastructure projects that are heavily depended on engineering, the Malaysian Institute of Engineers (IEM) issue standard form contracts that can be used for a variety of infrastructure projects and they administrate arbitrations falling within their purview;

there are particular types of commodity trading that tend to include institutional arbitrations under the Control of local institutions and also international institutions. Arbitrations arising from the trade in rubber tends to be administrated by the Malaysian Rubber Exchange. Arbitrations arising from the trade in grain and animal feed tends to be administrated by the local branch of the Grain and Feed Trade Association (GAFTA). These arbitrations tend to be carried out using the “look-sniff” procedure.

2-5 Institutional or Ad Hoc Arbitrations

63. Fundamentally, it must be recognized that at times, the choice between institutional arbitration and ad-hoc arbitration strictly is not an option for various parties. Institutional arbitration is dictated by certain industries and trades based on the common usage of their standard form contracts.

64. The construction industry tends to dictate the use of institutions simply because the contracts utilized have been developed by the said institutions and these institutions have had a history of promoting and administrating arbitrations. These institutions also tend to promote their ability to nominate or appoint the appropriate arbitrator suited for the type of dispute that would likely arise in respect of their standard form contracts. However, other than the international institutions and the KLRCA, it is believed that the other local institutions.

65. On the other hand, some international institutions such as the International Chamber of Commerce, charge extremely high administrative fees (but with added services), which tends to discourage local parties from using them.

66. As such, it is now a tendency for draftsmen to modify standard form contracts issued by some of these institutions to effectively convert the arbitration to an ad-hoc arbitration.

2-6 Language

67. Whilst the old legislation did not expressly provide for any applicable language, it was always implied that the language would be that agreed upon by the parties or otherwise determined by the arbitral tribunal.

68. Under the new legislation, this implication has now been expressly covered. English language is the commonly used language for arbitrations conducted in Malaysia.

2-7 Statistics

69. The statistics show that there are about 4 to 5 international arbitrations per year and about 10 domestic arbitrations per year conducted at the KLRCA in Malaysia. This is of course dependent on the economic climate in Malaysia.

70. Additionally, it must be noted that due to certain governmental policies, which are applicable to certain industries in Malaysia, foreign entities are required to conduct their businesses using locally incorporated vehicles with their place of business primarily in Malaysia. Therefore, when disputes arise involving these parties, in all likelihood, they are categorized as domestic arbitrations.

71. The statistics on the number of international and domestic arbitrations under the administration of other institutions are not available. Likewise, there are no statistics on the number of ad-hoc international or domestic arbitrations. It is recognized however that there are a larger number of other institutional and ad-hoc domestic arbitrations held every year. There are also quite a few international arbitrations held in Malaysia under the auspices of the International Chamber of Commerce and WIPO every year.

72. There are also a considerable number of domestic statutory arbitrations held each year.

2-8 Mediation

73. There are various mediation bureaus set up by particular statutory bodies that govern particular industries. These statutory bodies also act as a watchdog for the industry. These are normally consumer service related industries. Whilst the bureaus that are set up are referred to as mediation bureaus, they are effectively set up to deal with complaints by consumers against the industry members and the outcome of the mediation tends to be effectively a determination of the disputes (although the approach to pre-determination discussion is akin to mediation) and if the outcome is in favour of the consumer, it is deemed to be binding on the member but not so if it favours the member. Examples of these are:-

the Insurance industry is governed by statute and the licensing authority, the Central Bank (Bank Negara), acts as its watchdog. Bank Negara set up the Insurance Mediation Bureau (IMB), which is empowered to hear complaints and claims arising from insurance policies and its findings on complaints or claims for a value of up to RM100,000.00, which was in favour of the complainant would be binding on a member company. Any other findings or any findings for a value in excess of RM100,000.00 has the effect of being a recommendation only in respect of the excess. However, the IMB has generally refused to deal with any complaint or claim that could lead to a finding of a value of over RM100,000.00 as it effectively does not see itself as a mediation body;

likewise, in 1997, the Central Bank set up the Banking Mediation Bureau (BMB) to deal with complaints and claims against banks and financial institutions;

recently, the Central Bank set up the Financial Mediation Bureau (FMB) which is a merger of the 2 mediation bureaus for the banking and insurance industries. The jurisdiction is now limited to determining complaints and claims for banking services where losses do not exceed RM100,000.00, and complaints and claims relating to the insurance industry namely for motor and fire insurances where claims do not exceed RM200,000.00, general insurance products where the claims do not exceed RM100,000.00 and for 3rd party property damage where the claims do not exceed RM5,000.00.

74. The Bar Council of Malaysia also established the Malaysian Mediation Centre on 5.11.1999. Presently there are 101 mediators who are also legal practitioners attached to the Centre but recent trends show that they are seriously under- utilized.

75. The KLRCA also provides for conciliation and mediation by applying the UNCITRAL Conciliation and Mediation Rules but again the statistics show that it has had only 1 dispute referred to mediation since 2002 .

76. There are also statutory reconciliation tribunals set up to force parties as a pre-requisite, to attempt to avoid disputes on certain private rights namely, matrimonial disputes[20].

77. Essentially mediation and conciliation as a form of ADR is in its infancy in Malaysia. The Malaysian courts have introduced extensive powers to the judge to manage the cases before them but none of these powers seem to lean towards encouraging a settlement.

78. Since 1998, there have been attempts by certain domestic institutions to promote mediation and these domestic institutions provide the mechanism and administrate the mediation process itself. These institutions have their own accredited mediators to act upon a reference. Examples of these domestic institutions are:-

[20] S106 Law Reform Act 1976

the Malaysian Association of Architects in their present draft of the standard form contract issued in 1998, have provided for a mediation process administrated by them in addition to providing for a reference to arbitration. However the parties are consensually required to submit themselves to the mediation process. Hence todate, there has been no development of this process;

the statutory body set up by the Government to regulate the construction industry which is referred to as the Construction Industry Development Board (CIDB) produced for the first time their own standard form contract in the year 2000 which provides for mediation under their administration as a condition precedent to any reference to arbitration. This was seen as a more effective way of promoting mediation but effectively forcing a reluctant party to mediation was defeatist of the necessary ingredient that makes mediation successful namely, a consensual subjection to the mediation process with an intention to settle. Again this particular attempt to promote mediation has not been successful for many reasons which includes the lack of use of the CIDB standard form mainly because it has certain major flaws in its drafting and more importantly, the CIDB is generally seen as an organization with its main function being that of the collection of revenue for the government (there being a percentage based levy placed on all construction contracts awarded to members).

79. It is not clear why mediation has not found a strong following within a society that on the surface seem to deplore open hostilities and confrontation. However there are many possible reasons why mediation has not worked thus far in Malaysia especially for domestic disputes, and this includes the fact that

Malaysia is actually made up of a very litigious based society today with a tendency not to trust any system that does not force compliance. Further, the lack of encouragement for the mediation process from the authorities including the judiciary and the legal fraternity (for obvious financial reasons), has been the downfall of mediation as an ADR process.