

# **The Choices of Law – Better Safe Than Sorry**

## **The Malaysian Arbitration Perspective**

Belden Premaraj, of Lincoln's Inn, Barrister

The issues on choices of law and the conflict of laws in an arbitration perspective has very often been a studied neglect or a calculated confusion<sup>1</sup>. Some views on choice of forum and choice of substantive law have been raised in local writings but there are no serious considerations of the myriad of choices that are available to parties as well as the need for parties to exercise such choices when dealing with a forum like arbitration and especially arbitration in Malaysia.

Parties to an agreement which includes an arbitration clause have a tendency to select a law which they assume will give effect to the entire agreement. These parties do not think in terms of substantive parts of the contract, formal parts of the contract, the process and procedural parts of the contract and most certainly will not be thinking in terms of conflict of laws split between substance, process and procedure.

Parties therefore tend to deal with the entirety of their relations, establishing a framework which they believe will govern the continuity of their legal relations. If they are therefore in such a mood, does it not seem realistic to further rather than frustrate such a purpose?<sup>2</sup>

Nevertheless, the modern requirement and the present legislated requirement is for parties to consider separately the different elements within their contract and to distinguish the substantive contract from the process of arbitration and to also distinguish the process of

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<sup>1</sup> It is a studied neglect by the fact that looking at the local legal precedents, one would find very little other than generalizations. It is a calculated confusion because there are no legal opinions nor standard form arbitration agreements that have provided parties with an opportunity to realize the extent of the choices available.

<sup>2</sup> Proposition raised in David S Stern's paper entitled "The Conflict of Laws in Commercial Arbitration" Vol.17 Law and Contemporary Problems 1952

arbitration from the procedure of arbitration, and to actually consider the possibility of conflict between these particular areas or within these particular areas.

There is not just the question of the substantive law but there is also the question of the law of the arbitration that will govern the constitution of the arbitration process, the rules or law on the procedure that will be practiced by the arbitral tribunal and the law that is applicable when there is a conflict of laws. Choice of procedural rules and choice of conflict of laws rule are also essentially choices of laws. Hence, the use of the title “*choices of law*” rather than “*choice of law*”.

For court litigation, a choice of the substantive law and a choice of the jurisdiction would be the extent to which a party may be required to determine. The issue of jurisdictional choice does give rise to many controversial public policy viewpoints<sup>3</sup> but once this issue is determined, the law governing the constitution of the court, the law governing the procedure as well as the law in determining any conflict of laws, are no longer options required of parties as it tends to follow the laws of the jurisdiction.

In arbitration, jurisdiction being akin to the seat/place of the arbitration does not automatically determine all other aspects of the choice of law or conflict of laws<sup>4</sup>.

An arbitral tribunal can be constituted in one jurisdiction, can gather and hear the disputes in one or many other jurisdictions and can consist of persons from various other jurisdictions with their differing views on procedure. The arbitral tribunal’s power and

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<sup>3</sup> In Malaysia, **Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong [1995] 1 MLJ 332** (following **Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Bhd [1976] 2 MLJ 154**), referred to jurisdictional choice as “a forum selection clause”, refused to follow the “**Zapata test**” (**Bremen v Zapata Off-Shore Co [1972] 407 US 1**), and pronounced that the Malaysian Court had the discretion to refuse a jurisdictional or forum choice albeit with good reasons which are essentially forum convenience considerations but with a shift in the burden against the party in breach of the choice. The other reasons considered were also essentially protectionist considerations such as the convenience of the Malaysian party, whether the Malaysian party would be prejudiced in a foreign court and even whether the legal process conformed to Malaysian standards.

<sup>4</sup> A comment made in the Sapphire arbitration: “*Contrary to a state judge, who is bound to conform to the conflict law rules of the State in whose name he metes out justice, the arbitrator is not bound by such rules. He must look for the common intention of the parties, and use the connecting factors generally used in doctrine and in case law and must disregard national peculiarities.*”

jurisdiction comes from the parties namely through the arbitration agreement. Hence being a derivative of the arbitration agreement, the arbitral tribunal takes its guidance from the choices put forward by the parties and if there is a lack of such choices, arbitration does not naturally provide for an easy determination of any applicable law disputes.

If the arbitral tribunal is to be bound to apply any particular conflict rules it must be because the parties have determined that some rule of law binds them to do so. For an arbitral tribunal, there must be an additional legal system prescribed in the hierarchy: an ultimate legal system which prescribes the conflict rules that are to be applicable, if any, in determining the applicable choices of law for the various areas concerned.

Levontin states,<sup>5</sup> “*Conflict situations carry with them a disturbing aura of insolubility*”. In its practical application, a choice of law problem is not one of conflict, but of choice.

When it comes to a determination of the choices of law, an arbitral tribunal would have to adopt one of the following approaches:-

- (a) respect the parties’ express choices;
- (b) attempt to ascertain the parties’ implied or tacit choices;
- (c) apply the parties express choice of conflict rules;
- (d) apply the parties implied or tacit choice of conflict rules;
- (e) apply their own conflict rules.

In arbitrations, the parties’ express and clear choice remains the most superior and satisfactory solution to any potential conflict of laws situation. This is an important right and one which parties to any contract, especially an international commercial contract, should take care to exercise. It serves the aims and interests of true party autonomy.

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<sup>5</sup> Levontin, *Choice of Law and Conflict of Law*, 1976 Sijthoff, Leiden at p. 3.

In the absence of an express choice of law, the arbitral tribunal must look for the law that the parties are presumed to have intended. This is often referred to as a *tacit* choice of law. It may also be known as an implied, inferred or implicit choice. However, there is a certain artificiality involved in selecting a governing law for the parties and attributing it to their tacit choice, particularly where such a tacit choice is ambiguous in the first place or if it is apparent that the parties themselves gave no thought to the question of the various choices of law.

In the absence of any express or implied choice of law, conflict of law rules are then resorted to. As stated above, the problem that arises is as to which particular conflict of laws rules are to apply. Conflict of laws rules differ from one nation to another. An arbitral tribunal may select the applicable law by reference to the place where the contract was negotiated or executed, or by reference to the place where the arbitration agreement was negotiated or executed, or by reference to the place most closely connected to the contract, or by reference to the place most closely connected to the disputes or by reference to the place where the hearing is being held, or by reference to the seat of arbitration, or by reference to their own compromised and applied conflict of law rules. In the context of international commercial arbitration, this is plainly unsatisfactory.

Conventionally, there is a principle which attributes a choice of substantive law to the parties in the absence of any express choice by basing it on the seat or place of the arbitration. If the parties make no express choice of substantive law, but agree that any disputes between them shall be litigated or arbitrated in a particular country, it is often assumed that they intend the law of that country to apply to the substance of their disputes. This concept is expressed in the maxim *qui indicem forum elegit ius*; a choice of seat or place of arbitration is a choice of the applicable law for all matters.

For a time, this maxim held sway. It has however come to be recognized that a particular seat or place of arbitration may be chosen for many reasons unconnected with the acceptability of the law of that seat or place of arbitration. It may be chosen because of its geographical convenience to the parties, or because it is a suitably neutral venue, or

because of the good reputation relating to the arbitration services that are to be found there, or for some other equally valid reason which has nothing to do with the applicability of the law of the said area. Accordingly, the choice of a particular seat or place is now seen as *“merely another general connecting factor which may be of relevance in the circumstances of the particular case”*.

This maxim becomes even more uncertain when the seat of the arbitration is distinguished from the place of the arbitration. It is also clearly inapplicable when the parties have not chosen the seat or place of the arbitration.

Given the above, the necessary, if unwelcome, answer is that it is a matter for the arbitral tribunal itself to decide based on conflict of laws rules but without guidance to any particular conflict of laws rule. This approach prescribed by the UNCITRAL Model Law is far from satisfactory as it leads to uncertainty for the parties and could result in the use of a set of conflict of laws rules which ends up with choices of law that may not be familiar at all to the parties. There could be choices of law that place greater emphasis on equity and good conscience.

In determining the various choices of law, there is also the other uncertainty of whether the arbitral tribunal can ignore mandatory provisions and public policy applicable to the place most closely connected to the contract or the dispute, in determining the substantive dispute, or the mandatory provisions and public policy applicable to the seat or place of the arbitration in determining any jurisdictional or procedural disputes.

Lando in his paper entitled Conflict of laws Rules for Arbitrators (1985) 34 ICLQ pp. 764-8, states:-

*“...although the arbitrator derives his or her authority from the will of the parties, he or she cannot have regard to their interests only. Like the courts of law which he or she replaces, he or she must consider any strong principle of public policy of a country closely connected with the contract...furthermore, every arbitrator has to consider the importance of preserving commercial arbitration as an instrument for the settling of international disputes...If...arbitration is used as a means to evade the relevant policies of those countries which have an interest in the subject-matter of the disputes, the reputation of arbitration will suffer...”*

It is therefore necessary that the parties at least pre-determine the conflict of laws rule to allow uniformity in the determination of disputes on the process and procedure issues as well as the substantive issues regardless of the accident of the place of arbitration. Even if uniformity is not its main purpose, at least a reasonable satisfaction of the legal expectations of the parties would have been fulfilled.

Essentially, the questions on choices of law are extremely important in an international context especially where there can be some serious differences in the parties' legal systems. A good example of these differences lies in the area of contract interpretation where the common law system tends to be strictly based on the written terms in contrast to the civil law system that tends to favour reasonableness, good faith and parole evidence. The civil law system has concepts such as "*rebus sic stantibus*" which is that the contract is only binding so long as the circumstances expected when the contract was negotiated still stand<sup>6</sup>. This is in contrast with the "*pacta sunt servanda*" principle in the common law system which is that the express words of the contract must be obeyed.

It must be appreciated that an agreement on the various choices of laws may not totally ensure that the party autonomy is achieved. The choice of arbitrators will also affect the choices of laws as the arbitrators should be persons that are comfortable with such type of choices. Hence, the background of the arbitrators can become a further influential matter in ensuring the choices of the parties are truly understood and implemented.

### **Different Choices of Law**

In arbitration, especially international arbitrations, 4 choices of laws become relevant:

- (a) the law governing the agreement to arbitrate (i.e. the law of arbitration) or *lex arbitri*;
- (b) the law governing the substantive dispute or *lex causae* or *lex contractus*;

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<sup>6</sup> The concept of hardship under Article 6.2 of the UNIDROIT principles.

- (c) the law that relates to the conflict of laws rules that are to be applied when it becomes necessary or *lex loci*;
- (d) the procedural law or the rules of the arbitration (rules and procedures of arbitration).

It is believed that with a new legislation that adopts the Model Law in Malaysia, the issues relating to the choices of laws have become less problematic. This is however far from the truth because whilst the new legislation following the Model Law attempts to resolve or at least clarify some of the choices of laws problems, it in fact creates other problems or merely enshrines present problems without resolving it.

### **The Law of Arbitration / Lex Arbitri**

Parties, especially foreign parties, are often reluctant to settle their disputes by an arbitration governed under the laws of a country with which they are unfamiliar for the simple reason because they are unsure as to how effective the arbitration processes would be. Added to such uncertainty is the concern of judicial interference, delays and cost implications. Not surprisingly, there are also concerns (be it false or true) that the integrity of judicial systems in certain particular nations may be in question and thus it may likewise affect the integrity of the arbitral system in the said nation.

It is arising out of this general concern and its indirect impact on global commerce which led to the setting up of Working Committees under the auspices of the United Nations in order to discuss and agree on a globally acceptable model for the *lex arbitri*.

In Malaysia, under the previous model for the *lex arbitri*, there was no distinction between domestic and international arbitration and hence judicial attitude towards ensuring domestic arbitrations met domestic legal standards was extended to all forms of arbitrations. It was only in 1980 that Parliament first implemented a legislated curtail on judicial interference vide **Section 34** of the Arbitration Act 1952 but this was of a limited

extent as it was only applicable to KLRCA arbitrations or those arbitrations that applied the UNCITRAL Rules as the *lex arbitri* or the procedural rules.

### **The new Malaysian Arbitration Act 2005**

Reform finally took place with the enactment of the new **Arbitration Act 2005** (Act 646) on 30 December 2005, which is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (“the Model Law”). The new Act repeals and replaces the previous **Arbitration Act 1952** and the New York Convention enacted by Act 320 which dealt with the recognition and enforcement of international awards.

It is applicable to all arbitrations proceedings which are commenced after 15 March 2006, while the old 1952 Act will continue to apply to arbitral proceedings commenced before the operative date of the new Act.

By the adoption of the Model Law, it is clear that there is now some concentrated effort in making the law of arbitration in Malaysia more appealing to international arbitration. This is because the Model Law has widely received recognition from international States and hence, international businesses are more likely to feel comfortable with the *lex arbitri* being Malaysian law.

To fulfill the need of ensuring domestic arbitration is to some extent conducted in accordance with domestic standards, the Act provides for two distinct arbitral regimes, i.e. international arbitrations and domestic arbitrations. This is modeled on the New Zealand Act. The main difference between the two regimes lies in the degree of interference from the Courts with arbitral awards but yet options are provided.

The model adopted by the Act provides 2 main functions namely a gap filling function by providing default positions for various matters relating to the arbitration process and a regulatory function which does not apply to international arbitrations but with an option



to pick, choose and adopt any of the regulatory functions. The Act is divided into 4 parts. In so far as the provisions in Parts I, II, and IV are concerned, they are mandatory provisions which apply to all arbitrations where the seat is in Malaysia. The provisions in Part III (which contain enabling provisions for judicial control) becomes the crucial consideration. For international arbitrations, Part III is non-mandatory by the Act unless opted in. As for domestic arbitrations, Part III is automatically applicable unless opted out.

The important feature of the Act is the “opting in” and “opting out” provisions. Essentially, the opt out/opt in feature provides the parties with an option to modify their arbitration regime. Parties to a domestic arbitration are given power to opt out of the provisions in Part III, in whole or in part. This in effect allows the parties to bring the domestic arbitration regime closer to the international arbitration regime. The international arbitration structure also gives the parties freedom to opt in to all or any part of the provisions in Part III.

In addition, the Act also gives parties the right to avoid the “default” positions as set out in the Act. It must be pointed out that the Act contains many default provisions which deal with specific powers of the arbitral tribunal and the Courts. As these default provisions apply in the absence of the parties’ agreement to the contrary, it is important for parties to direct their minds as to whether they wish the default provisions to apply. If not, they must specifically provide for an alternative.

In essence, the Act recognizes the right of contracting parties to define their chosen processes within the arbitration regime. In line with the underlying theme of the Model Law, the Act focuses on the doctrine of party autonomy. However, with so many options, there is the danger of ambiguity and disputes arising therefrom.

One basis of maintaining party autonomy is the reduction of judicial intervention, especially for international arbitrations with an additional allowance for domestic arbitrations to expressly opt out of judicial intervention as well. **Section 8** of the new Act

also curtails the judicial interference by stating that: “*unless otherwise provided, no court shall intervene in any of the matters governed by this Act*”. This is a restatement of **Article 5** of the Model law. The powers of the Malaysian High Court to intervene in arbitration proceedings are thus limited to those situations specifically provided for in the Model Law.<sup>7</sup>

### **Its limitation/problems**

Despite the above, there appears to be some ambiguity/limitation that may lead to undesired results contrary to the intention of the Act. They are as follows:-

- (a) the uncertainty that is created if the *lex arbitri* is not determined by the parties;
- (b) there may be an issue of whether the Malaysian court will assist or will interfere if the seat of arbitration is outside Malaysia; and
- (c) the likelihood of further disputes that is caused by the opting in/opting out entitlement.

*Issue (a) What happens if the lex arbitri is not determined by the parties?*

It is important to bear in mind that the Act fixes the territorial limits for the application of the Act. The Act applies only to arbitrations in which the “seat of arbitration” is Malaysia. This can be seen in **Section 3 of the Act**:-

“3 *Application to arbitrations and awards in Malaysia*

- (1) *This Act shall apply throughout Malaysia.*
- (2) *In respect of a domestic arbitration, **where the seat of arbitration is in Malaysia-***
  - (a) *Parts I, II and IV of this Act shall apply; and*
  - (b) *Part III of this Act shall apply unless the parties agree otherwise in writing*
- (3) *In respect of an international arbitration, **where the seat of arbitration is in Malaysia-***

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<sup>7</sup> However, the Court’s power to remedy abuses such as fraud, corruption and non-observance of the rules of natural justice and enforcement of arbitral awards is preserved by s. 37.

- (a) *Parts I, II and IV of this Act shall apply; and*
  - (b) *Part III of this Act shall not apply unless the parties agree otherwise in writing.*
- (4) ... ”

The seat of arbitration is determined by the provisions in **Section 22 of the Act**. It provides that:

“22 *Seat of Arbitration*

- (a) *The parties are free to agree on the seat of arbitration.*
- (b) *Where the parties fail to agree under subsection (1), the seat of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.*
- (c) *Notwithstanding subsections (1) and (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.”*

It is clear that **Section 22** provides for a two-tiered system which gives the parties freedom to choose the seat of arbitration (**Section 22(1)**). In cases where the parties fail to determine the seat of arbitration, the arbitral tribunal has a default power to determine the seat of arbitration by having regard to the circumstances of the case, including the convenience of the parties (**Section 22(2)**).

An express provision giving freedom to the parties to agree on the seat of arbitration will seem at first blush to have removed any fear that the Courts could still refuse to be held bound by a jurisdictional or forum choice (ie. forum selection clause)<sup>8</sup>.

Nevertheless, as the Act does not survive if the seat of arbitration is not Malaysia, such a provision may not prevent the Court from refusing to be bound by a choice of a foreign seat, as the Act will not apply in such a circumstance.

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<sup>8</sup> The decision of **Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong [1995] 1 MLJ 322**, referred and accepted the dicta of Indian precedents such as **New Great Insurance Co of India v ASA Kampagni AIR 1964 Bom 71**, **Ramji Dayawala & Sons (P) Ltd v Invest Imports AIR 1981 SC 2085**, **Hindustan Zinc Ltd v Associated Metals & Minerals Corp AIR 1983 Bom 131**, all of which refused to stay suits in India in defiance of an agreement to arbitrate abroad.

It is therefore imperative that the Act allows for the survival of certain provisions, including this particular provision on the freedom of parties to agree on the seat. Alternatively, it is hoped that the Courts would take a different approach bearing in mind the spirit of the legislation and the Court would be ready now to accept the “Zapata test”<sup>9</sup>, which is that it is bound by a forum selection clause at least when it comes to arbitration unless there is fraud or undue influence in the agreement on the forum selection.

There is the added possible method of tacitly or impliedly determining the parties agreement on the *lex arbitri* such as in the case where parties may have indirectly done so through an agreement for an institutional arbitration.

An example of this arises if the parties have not agreed on the *lex arbitri* but have prescribed that the arbitration is to be held under the auspices of the ICC. Pursuant to Article 12 of the ICC Rules, the International Court of Arbitration shall determine the place of arbitration.

However, there is uncertainty as to whether the mere right to determine the place of arbitration would extend to a right to determine the *lex arbitri*. **Section 22 (3)** of the Act seems to distinguish “*place of arbitration*” from “*seat of arbitration*”. As such, whether “*place = seat*” is presently uncertain.

The Act may have been better worded if it was drafted to read “*the parties are free to agree on the seat of arbitration or the procedure for determining the seat of arbitration*”. Such wordings referring to an agreed procedure is made applicable in the provision dealing with the choice of arbitrators as seen in **Section 13** of the Act. However, similar wordings have not been used for the provision relating to the choice of the seat of arbitration.

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<sup>9</sup> See footnote 3

It will remain an area of debate as to whether the Court will consider this indirect agreement by the parties on the procedure for determining the seat of arbitration as superseding **Section 22(2)**. It must be noted that **Section 22(2)** makes it clear that where the parties fail to agree on the seat of arbitration, the arbitral tribunal shall be entitled to determine the seat of arbitration. As such, would the Malaysian courts consider the arbitral tribunal's entitlement to determine the seat as taking precedence over the International Court of Arbitration's entitlement to determine the place of the arbitration when it is an ICC arbitration? Would the arbitral tribunal decline to determine and give precedence to the International Court of Arbitration especially as the arbitral tribunal would have been constituted by ICC? Would this give rise to a valid dispute?

There could be more room for asserting an indirect agreement by the parties in instances where the adopted institutional rules by itself prescribes or fixes the place of arbitration rather than it nominating another authority other than the arbitral tribunal to determine the place of arbitration. In the case of domestic institutions such as PAM (Malaysian Architects Association), the place of arbitration is prescribed as being Malaysia.

The Act allows the arbitral tribunal to determine the seat of arbitration. The Arbitral tribunal is required to consider forum convenience and other circumstances involved in the particular case<sup>10</sup>.

It is to be noted that arbitral tribunal's power to determine the seat of the arbitration using principles of forum convenience and other circumstances as its guiding tool is not further elaborated with any reference to any particular *lex loci*.

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<sup>10</sup> In respect of **Section 22(2)**, the arbitral tribunal cannot simply fix the venue of its choice without regard to the convenience of the parties. It has to consider all the material circumstances, including the nationality, residence of the parties, their witnesses, freedom to transfer necessary funds, the subject matter of the reference, the balance of convenience and whether there is adequate infrastructure including the availability of skilled support to accommodate the parties (see *UP Ban Nigam Almora v. Bishan Bath Goswami AIR 1985 ALL 351 at 353, per NN Sharma J*; *Hiscox v. Outhwaite (No. 1)[1992] 1 AC 562.*). In the final analysis, the suitability of a particular place is dependent on its legal environment for the conduct of the arbitration and enforcement of the award. (see Redfern and Hunter, p 322, paragraph 6-13).

It therefore remains unknown whether these other circumstances include issues such as the enforceability of the award at the place of arbitration, the ability to obtain interim preservation orders at the domestic courts at the place of arbitration, compatibility of the *lex arbitri* of the place of arbitration to the international standards, the prejudices that may be faced by any particular party and other perhaps more protectionist considerations. It is unknown whether the Malaysian Court could inevitably construe an arbitral tribunal as having failed to apply the appropriate considerations in determining the seat of arbitration especially as the legislation has not prescribed any particular standard or the parties have not prescribed a standard by way of reference to any particular nations *lex loci*.

Whilst the Act does provide some guidance to the arbitral tribunal in their determination of the seat of arbitration, there is a strong possibility that there could be conflicting interest and conveniences that arise. Again, different judicial systems have differing principles on determining forum convenience, some which provide for preferences to certain type of interest and certain type of conveniences compared to others.

If it comes to a situation where the arbitral tribunal is to determine the seat of arbitration, parties may then on hindsight wish to agree and prescribe the *lex loci* applicable to the determination of the *lex arbitri* as otherwise, the preferences placed by the arbitral tribunal between various conflicting interest and conveniences may not be acceptable to both or either parties and could lead to further conflict or dispute.

There ought to be concern over any disputes on the arbitral tribunal's determination of the seat of arbitration as it may surface as a jurisdictional dispute in terms of the arbitral tribunal's scope of authority, which can be referred to the High Court pursuant to **Section 18(8)** of the Act.

It is to be noted that as **Section 22 (3)** of the Act suggests a distinction between “*seat*” and “*particular place for convenience*”, an arbitral tribunal may have to discount any

consideration of the place of convenience for the hearings, in determining the seat of arbitration.

The distinction between “*seat*” and “*place for convenience*” in the Act may lead to more uncertainty on the conflict of laws rules and forum convenience that is to be considered by the arbitral tribunal. This uncertainty will be a serious issue unless the parties have determined the *lex arbitri* or at least the *lex loci* applicable to the determination of the *lex arbitri*.

Further, in providing for the arbitral tribunal’s power to determine the *lex arbitri* or even the principles that are to be used in such a determination, it seems that the Act has overstepped its enforceability.

Reading **Section 22** in conjunction with **Section 3**, it is unclear how the Act will even apply vis-à-vis the arbitral tribunal’s right of determining the seat, if the parties have not already expressly chosen Malaysia as the seat of arbitration.

As the Act does not survive if the seat of arbitration is not determined as being Malaysia, it is difficult to see how **Section 22 (2)** can be enforced at all. It is a “catch-22” situation where **Section 22 (2)** of the Act can only be enforceable if the seat of arbitration has already been determined by the parties as being Malaysia, which essentially makes **Section 22 (2)** redundant in any event.

**Section 22 (2)** has therefore very little benefit and even less scope of enforcement even if it was made to survive a non-determined seat of arbitration, because it perhaps can only be enforced against an arbitral tribunal that consist of foreign arbitrators, if and when the arbitral tribunal uses Malaysia as its forum convenience to hear the arguments for their determination of the seat of arbitration. If the arbitrators are foreign international arbitrators who hear the arguments in writing, there is no manner for any enforcement of the Malaysia Arbitration Act 2005 against them when the *lex arbitri* in fact has yet to be

determined and the Malaysian Act has no jurisdictional enforcement against the arbitrators.

If this legislative deficiency is not resolved, it will be interesting to see whether the Malaysian courts would adopt the indirect approach by the Indian courts on a similar question of the survival of provisions in the Indian Arbitration and Conciliation Act 1996 even when the place of arbitration is not in India. The Indian courts have cleverly construed the definition as being inclusive rather than exclusive and therefore deems that it applies to even foreign arbitrations<sup>11</sup>.

Nevertheless, there is a danger that the Malaysian courts may not adopt a similar approach as in India especially as in the case of the Malaysian Act, the draftsmen were afforded the opportunity to adopt **Article 1(2)** of the Model Law which provides for the survival of some provisions in the Model Law regardless of the seat / place, and clearly chose not to do so, whilst the Indian Act was not drafted with that same option.

It is believed that **Section 22 (2)** can only remain as a basis to challenge the principles or test used by an arbitral tribunal in determining the seat of arbitration but only after they have determined it to be Malaysia. This is indeed food for thought.

*Issue (b)      What judicial assistance / interference would arise if the seat of arbitration is not Malaysia?*

A problem arises as to the extent of judicial interference or judicial assistance that will be offered by the Malaysian courts when the seat of arbitration is outside Malaysia.

Examples of the problems that may arise are:-

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<sup>11</sup> **Dominant Offset P Ltd v Adamovske Strajirny AS [1997] 68 DLT 157, Olex Focas Private Ltd v Skodaexport Company Ltd AIR 2000 Del 161 and Bhatia International v Bulk Trading SA AIR 2002 SC 1432.** However see the different views in **East Coast Shipping v MJ Scrap [1997] 1 Cal HN 444, Marriott International Inc v Ansal Hotels Ltd, AIR 2000 Del 377**



- a. an arbitration in Singapore but a Malaysian Court grants an injunction preventing the Malaysian parties from proceeding with an arbitration or refusing to grant a stay of proceedings in the Malaysian Courts, because no Act applies and the courts are free to interfere based on their inherent jurisdiction;
- b. an arbitration in Singapore but a Malaysian Court refuses interim preservation applications (i.e. Mareva injunction) because no Act applies and the Court believes that as such, it has no jurisdiction.

Under **Article 1(2)** of the Model Law, this problem is in fact prevented by allowing particular articles to survive even if the seat of arbitration is outside the jurisdiction. Under the Model Law, there are four other provisions that survive despite the seat being outside the territory in question. The provisions are:

Article 8, Arbitration agreement and substantive claim before court (stay powers)

Article 9, Arbitration agreement and interim measures by High Court

Article 35, Recognition and enforcement of awards

Article 36, Grounds for refusing recognition or enforcement of awards.

This particular Model Law approach has been adopted in various other jurisdictions such as England namely through **Section 2(2) English Arbitration Act 1996**. It is uncertain as to why the **Arbitration Act 2005** did not incorporate the approach taken by **Article 1(2)** of the Model Law.

For the present moment, we can presume that the Malaysian Courts will offer interim measures of protection even if the arbitration is a foreign arbitration<sup>12</sup>.

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<sup>12</sup> In **Thye Hin Enterprises Sdn Bhd v Daimler Chrysler Malaysia Sdn Bhd** [2005] 1 MLJ 293, the principles enunciated in **Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd** [1993] 1 AllER 664 by Lord Mustill, which prescribes that interim measures are in assistance and in support of international arbitrations and not an encroachment into the procedural powers of the arbitrators, was accepted (although in that case, it was a KLRCA arbitration and the ambit of S.34 Arbitration Act 2952 was determined).

Likewise, it is hoped that the spirit of the Arbitration Act 2005 especially in relation to international arbitrations, will curtail the Malaysia Courts from interfering with foreign arbitrations.

*Issue (c) The likelihood of further disputes- the Opt in/Opt out rights and the default provisions*

It must be remembered that the power to “opt in/opt out” is only exercisable vis-à-vis provisions in Part III of the Act. There are also many default provisions that apply unless parties agree.

There are 2 serious problems that can arise from this freedom to contract:-

- a. Does a party know whether it would fall within the international or domestic regimes in order to decide whether it has to opt in or opt out?
- b. When drafting the opt in or opt out provisions in addition to any other term that may otherwise attract a default provision, ambiguity may be created and disputes may arise as to the true intention of the parties on the *lex arbitri*

On the first problem as to whether a party falls within the international or domestic regimes, at first blush, it would seem pretty straightforward based on the definitions provided in the Act.

**Section 2(1) of the Arbitration Act 2005** states:

*"international arbitration" means an arbitration where—*

- (a) one of the parties to an arbitration agreement, at the time of the conclusion of that agreement, has its place of business in any State other than Malaysia;*
- (b) one of the following is situated in any State other than Malaysia in which the parties have their places of business:*

- (i) *the seat of arbitration if determined in, or pursuant to, the arbitration agreement;*
- (ii) *any place where a substantial part of the obligations of any commercial or other relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected;*  
*or*
- (c) *the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one State;”*

**Section 2(2) of the Arbitration Act 2005** states

“(a) *in the definition of "international arbitration"—*

- (i) *where a party has more than one place of business, reference to the place of business is that which has the closest relationship to the arbitration agreement; or*
- (ii) *where a party does not have a place of business, reference to the place of business is that party’s habitual residence;”*

The difficulty however arises when a foreign party has more than one place of business and at least one of its places of business is also in Malaysia and obviously, the intended performance under the contract and the likely disputes are to arise in Malaysia. The Act then refers to a second test that is to apply namely “*the place of business in that which has the closest relationship to the arbitration agreement*”.

An ambiguity is created by this term “*closest relationship to the arbitration agreement*” which is *in pari materia* to that used in **Article 1 (4) (a)** of the Model Law. The ambiguity becomes clear when the disputes that have already arisen in other jurisdiction are considered.

Parties have argued that the definition can only mean the place where the arbitration agreement itself was negotiated, offered, accepted, executed etc. Nevertheless, there is now a given interpretation in other jurisdictions that do not conform with any literal interpretation of the language used.

In **Aron Broches’s Commentary on the UNCITRAL Model Law on International Commercial Arbitration** (1990) published by Kluwer, the commentary states:-

*“The Law deals in subparagraph (4)(a) with the case in which a party has more than one place of business, and in (4)(b) with the rare case in which a party has no place of business. Divergent views were expressed in the Working Group with respect of what become (4)(a). Some felt that where a party had more than one place of business, its principal place of business should be regarded as its place of business for the application of subparagraph (3), since this would provide a clear criterion. The prevailing view in the Working Group was, however, in favour of the place of business which has the **closest relationship to the arbitration agreement**, a criterion which was similar to **Article 10(a) of the 1980 Vienna Sales Convention**. The relationship between a place of business and an arbitration agreement is not a very clear concept. It should probably be understood as meaning, or at least including, **the implementation of the agreement and the subject matter of the dispute**. [emphasis added].”*

In the UNICITRAL Model Law on International Commerce Conciliation with its Guide to Enactment and Use 2003, where a similar provision exist, the commentary states:-

*“Factors that may indicate that one place of business bears a close relationship with the agreement to conciliate may include that a substantial part of the obligations of the commercial relationship that is the subject of the dispute is to be performed at that place of business, or that the subject matter of the dispute is most closely connected to that place of business.”*

This definition which suggests that the place of performance or the place of dispute is the place with the closest relationship to the arbitration agreement has now been adopted in jurisdictions such as Hong Kong<sup>13</sup> and Singapore<sup>14</sup>.

Will the Malaysian Courts interpret it the same way? Can such an interpretation be taken when it clearly stretches the imagination that “*closest relationship to arbitration*

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<sup>13</sup> **Fong Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd** [1991] 2 HKLR 526

<sup>14</sup> **Mitsui Engineering & Shipbuilding Co Ltd v PSA Corp Ltd and Another** [2003] SLR 446

*agreement*” can be construed as being “*closest relationship to the substantive agreement*” especially since the Model Law and **S.18 (2)** of the **Malaysian Arbitration Act 2005** has taken great efforts in ensuring that the arbitration agreement is to be construed as independent from the substantive agreement.

Further, reading **Section 2 (1)** of the **Malaysian Arbitration Act 2005** (in *pari materia* with the Model Law), the place of business definition relates to an identification of the place of business at the time of the conclusion of the arbitration agreement (ie. execution) [emphasis added] and not at the time when a disputes arise or contract is performed. Surely this was done intentionally to identify the place at the time of the execution of an agreement and not its performance or when a dispute arises. As such, could the place of business be ever construed as that closest to the place of performance from whereat the dispute arises? Surely not in any common sense approach.

Where does this leave companies that are not Malaysian who are already carrying out business in Malaysia and have a place of business in Malaysia but have executed the agreement in their own countries? Do they opt in or do they opt out?

The resolution to this problem may lie in **Section 2(1)(c)** of the definition of international arbitration where parties may have to then expressly agree that the subject matter of the arbitration agreement relates to a foreign state as well. However, can this be done if the performance of the contract and hence the subject matter of the dispute can only be in Malaysia and the seat of arbitration is Malaysia?

It must be noted that the working committee on the Model law was divided on the definition as to the place of business preference provision. A faction of the committee argued that the “*principal place of business*” would have been a better and clearer definition. In the end, the present unsatisfactory definition was adopted. In such a situation, one must give credence to the warnings of Lord Mustill in the Mustill Report especially on the fact that the language used in the Model Law is different from that typically used and understood in England or Malaysia.

On the second problem of the freedom to draft creating more disputes, the Act in fact urges parties to carry out comprehensive drafting of provisions governing the constitution of the arbitration process and the procedures by providing for default provisions and opt in / opt out options. Attempts to deal comprehensively with specific areas of the *lex arbitri* and the procedure could likely lead to more ambiguity and more dispute. After all language is an ambiguous creature. There is a likelihood that more disputes on the arbitration process following a drafted agreed *lex arbitri* could occur thereby for e-stalling the arbitration proceeding even before there can be any determination of the substantive disputes. This could lead to serious delays. Hence, the freedom to contract on various aspects of the *lex arbitri* can likely give rise more litigation.

### **The Substantive Law**

**Section 30** of the **Arbitration Act 2005** deals with the issue of the applicable law to the substantive dispute, i.e. the law that will govern the relationship between the party in relation to the entire contract and not the arbitration agreement or arbitration clause itself.

**Section 30** reads as follows:-

“30 *Law applicable to substance of dispute*

- (1) *In respect of a domestic arbitration where the seat of arbitration is in Malaysia, the arbitral tribunal shall decide the dispute in accordance with the substantive law of Malaysia.*
- (2) *In respect of an international arbitration, the arbitral tribunal shall decide the dispute in accordance with the law as agreed upon by the parties as applicable to the substance of the dispute.*
- (3) *Any designation by the parties of the law of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.*
- (4) *Failing any agreement under subsection (2), the arbitral tribunal shall apply the law determined by the conflict of laws rules.*

(5) *The arbitral tribunal shall, in all cases, decide take into account the usages of the trade applicable to the transaction.”*

**Section 30(1)** seeks to restrict party autonomy in domestic arbitrations where the seat of arbitration is in Malaysia. It mandates that the domestic parties are not free to choose their own choice of law to determine the substantive disputes. Under **Section 30(2)** and for international arbitration, the parties are allowed the freedom to choose the applicable substantive law.

Whilst at first blush the provision that makes Malaysian law the compulsory substantive law for domestic arbitration should not raise concern, it does in fact become a matter of concern when viewed with the problems that arise due to the definition of international and domestic arbitration. A foreign company with a place of business in Malaysia will have no choice but to accept Malaysian law for any disputes arising out of its businesses in Malaysia or otherwise, it should either ensure that it has no place of business in Malaysia or ensure that the seat of arbitration is not in Malaysia. The Act therefore becomes arguably self-defeating for foreign entities carrying out businesses in Malaysia.

Even if it is merely applicable to domestic arbitrations, the freedom to choose the applicable law is not curtailed in the Model Law and the removal of such a freedom contradicts basic jurisprudential theories that have evolved contract law to the total *laissez-faire* concepts that are presently applicable. Furthermore, this freedom existed in Malaysia under the previous legislation and clearly a more compelling argument must be given as to why a freedom that previously existed is now completely removed.

It must be noted that parties usually determine the choice of law because they intend to dictate their vested rights by such laws. The vested rights will change if the parties are deemed to be bound to another law not of their choice and this can result in matters such as the interpretation of the contract differing from that actually intended by the parties.

Malaysia must be aware of the essential requirement for comity in protecting mutual interest and utility especially in that justice and morals dictate that parties are given the freedom of choice in Malaysia, so that Malaysian companies are likewise given the same freedom when carrying out business in other States.

Thus if progress is to be made in the field of arbitration, domestic or otherwise, the legislature must protect the right to choice of law with a realistic evaluation and appreciation give to globalization concepts and processes rather than a considerations purely on classical self-protectionist lines.

Further, **Section 30(2)** of the Act differs from the Model Law by its adoption of the freedom of the parties to choose a “*law*” rather than **Article 28(1)** of the Model Law which provides for the freedom the parties to choose a “*rule of law*”. **Article 28(1)** of the Model Law was seriously debated within the Working Committee and it was eventually agreed that the words “rule of law” would reflect the rights of parties in an international arbitration, to adopt not merely laws of a particular state but to also adopt international conventions along with the flexibility to chose particular different laws for different parts of the contract and to discard certain provisions in particular laws.

The difference may be significant as it may deprive parties from conducting arbitrations in Malaysia based just on particular agreed international conventions. This is especially commonplace in the shipping industry where conventions such as the Hague Rules and the Hague-Visby Rules are commonly held to be the only applicable law.

Arising from the ambiguity of the word “*rule of law*”, in India, the Commission set up to recommend amendments to the present **Arbitration and Conciliation Act 1996** has suggested a reversion to the word “*law*” rather than “*rule of law*” but with a wider interpretation to be given to the word to conform to the original intentions of the Model Law<sup>15</sup>.

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<sup>15</sup> UNCITRAL Report on Adoption of Model Law



The Malaysian legislature has failed to ensure that arbitrations where the only applicable law is international rules or conventions, are acceptable arbitrations. It remains uncertain whether the Malaysian court will be swayed by the spirit of the Act to accord such flexibility to the parties if and when parties have agreed to the application of only international conventions as the substantive law especially where some dispute on this matter is later raised as part of a challenge on the arbitral tribunal's scope of authority<sup>16</sup>.

The Malaysian Courts may indirectly achieve a satisfactory result by applying the conflict of laws rule that allows only the laws of a state that has adopted those international conventions to be considered as the applicable law<sup>17</sup>. There may however be other aspects of the particular state law that is not acceptable to nor intended by the parties.

### **The Law that applies to Conflict of Laws**

It is to be noted that for international arbitrations, the freedom to choose the substantive law is maintained.

If parties have however failed to choose the substantive law applicable, **Section 30(4)** dictates that the arbitral tribunal shall apply the law determined by the conflict of laws rule.

There is significance as to why the arbitral tribunal is not allowed to merely decide on the applicable substantive law but instead it is required to apply conflict of laws rule to its decision. There was division in the Commission Working Committee deliberating the Model Law but eventually the decision was to require the utilization of conflict of laws rule so that the arbitral tribunal could give its reasons for its decision on the choice of conflict of laws rule as well as thereafter on the choice of the applicable law.

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<sup>16</sup> The uncertainty is created by virtue of **Section 3 Interpretation Act 1967**'s reference to **Article 160(2) of the Federal Constitution**'s definition of the word "law" that connotes a law of a state and conventions that are adopted by a state.

<sup>17</sup> The High Court decision upheld in the Court of Appeal in **Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong [1995] 1 MLJ 322**

In the same vein, there could be disadvantages in requiring such an approach namely, that it may then allow disputes to arise on the choice of conflict of laws rule as well as the choice of the applicable law.

Each state under its law, has differing conflict of laws rules and the Act has not prescribed the laws of any particular state that is to apply so that the arbitral tribunal can conclude which conflict of laws rules are to be used by them in determining the substantive law applicable to the arbitration dispute.

Without any clear direction, the arbitral tribunal is left to guess as to whether the conflict of laws rules that are to apply are to be the *lex arbitri* or otherwise.

If otherwise, then which conflict of laws rules are to be utilized? Is it the *lex domicili* of the parties? Is it the *lex loci actus* (sometimes referred to as the *lex locus solutionis*) or the law of the place where the performance and dispute arises? Is it *lex reis sitae* or the law where the subject matter property is situated? Is it the *lex locus contractus* or where the law of the place where the contract was made?

There are suggestions that the arbitral tribunal ought to determine which conflict of laws rules to apply by using the system of law with which the transaction has its closest and most real connection<sup>18</sup>.

Again, there is no reason why this should be the case and what is certain, is that there could be further delays and potential judicial interference if the substantive laws that determine the dispute itself is challenged on the basis that the arbitral tribunal decided to use a particular system of law based on an unfair or inapplicable conflict of laws rule.

In fact, if the *lex loci* is determined based on the closest connection to the performance of the contract, it is likely that the *lex loci* of that state, especially if it was a common law

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<sup>18</sup> Dicey and Morris on the Conflict of Laws , pp. 1196-1197

state, would prescribe its own law as the applicable substantive law. Many common law conflict of laws rule prescribes the place of performance of the contract as the applicable law. Even civil law jurisdictions under the Rome Convention, whilst not applicable to arbitration, prescribes the applicable law as that which has the “*stricter connection*” to the contract (which tends to be construed as the performance)<sup>19</sup>.

If the *lex loci* is Malaysian, then the conflict of laws rule applicable in Malaysia prescribes that the applicable substantive law (i.e. the proper law) is to be the one with which “*has the closest and most real connection with the [contractual] transaction.*” It was held that the territory where the contract was made is only one of the relevant factors in the determination of the proper law of these contracts. The court must look at the whole circumstances of the case.

*“This issue must therefore be determined by common law principles set out in r. 180 of Dicey and Morris’ Conflict of Laws (11<sup>th</sup> Edn) Vol 1, p. 1161 et seq, which the learned judge correctly applied.*

*Even so, the territory where the contract was made is only one of the relevant factors in the determination of the proper law of these contracts. In addition to those listed by the trial judge, we consider the following factors equally relevant, namely: (i) the defendant could only legally make them in Ipoh; (ii) the documents exchanged indicate an implied choice of Malaysian law; and (iii) the circumstances show that delivery and payment were required to be made and were in fact made in Ipoh where the breach occurred.”<sup>20</sup>*

It is true that in today’s modern age, the place where the contract is made may offer little or no significance especially as contracts are concluded by telephone, fax, e-mails or meetings at locations which merely are convenient rather than legally intentional.

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<sup>19</sup> Art 4(2) Rome Convention

<sup>20</sup> **YK Fung Securities Sdn Bhd v. James Cape (Far East) Ltd (CA) [1997] 4 CLJ 300**

Nevertheless, **Section 30(4)** clearly departs from the wordings used in **Article 28(2)** of the Model Law. **Article 28(2)** states expressly that “*the arbitral tribunal shall apply the law determined by the conflict of laws rule which it considers applicable*” whilst **Section 30(4)** merely states “*the arbitral tribunal shall apply the law determined by the conflict of laws rules*”.

It is uncertain whether any significance should be placed on the choice of words under the Malaysian Act. In the case of the words used in the Model Law, clear discretion to adopt a particular conflict of laws rule is given to the arbitral tribunal. However, the exercise of such a discretion still requires reasoning as to why the particular conflict of laws rule was considered applicable, and it may attract challenge and very often a determination on the *lex loci* will lead to the same law as the *lex causae*. Hence some civil law systems and ICC have chosen to allow complete autonomy to the arbitral tribunal to determine the applicable substantive law without reference to any conflict of laws rule<sup>21</sup>.

Yet **Section 30(4)** of the Act does not seem to provide any discretion to the arbitral tribunal on the choice of a conflict of laws rule but at the same time does not specify the particular conflict of laws rule that is to be applicable. One is left wondering whether it prescribes the conflict of laws rule of Malaysia as this particular provision with the rest of the Act applies only when the seat of arbitration is Malaysia. The current language used is confusing and ambiguous and seems to distance itself from the spirit of the Model Law.

Furthermore, as **Section 30(4)** of the Act is binding if the parties fail to agree on the applicable law and **Section 30(2)** does not allow a choice of a “rule of law”, it is likely that an ICC institutional arbitration, where the ICC Arbitration Rules are to apply and which allows the arbitral tribunal to directly determine the appropriate substantive law

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<sup>21</sup> French Law under Art.1496 of the Code of Civil Procedure, Swiss Law in Art 187 Swiss PIL Act Chap 12, Dutch Law in Art 1054 Netherlands Arbitration Act 1986 and Art 17.1 of the ICC Arbitration Rules

applicable, will not supersede the more limited powers of the arbitral tribunal under **Section 30(4)** of the Act.

There ought to be serious concern over any disputes on the arbitral tribunal's determination of the substantive law as it may surface as a jurisdictional dispute in terms of the arbitral tribunal's scope of authority, which can then be referred to the High Court pursuant to **Section 18(8)** of the Act.

The other obvious effect of the Act, by not providing a right to the parties to agree that the arbitral tribunal can assume the powers of an *amiable compositeur* or to decide *ex aequo et bono*, is that Malaysia will not accept an international arbitration that determines the substantive issue purely on equity and good conscience unless, the equitable or good conscience principles are contained within the agreed or determined applicable substantive law.

The civil law systems of European countries tend to approve such form of equitable interference as long as it does not infringe public policy<sup>22</sup>. It is hoped that by removing the right of parties to agree to such types of arbitration, it does not discourage the European parties from using Malaysia as the seat of arbitration.

### **The Procedural Rules**

**Section 21** of the Act deals with the issue of the procedures applicable in the conduct of an arbitration proceeding. The previous Act was silent on the question of who was to determine the procedures that were to be adopted in the arbitration. This omission is now remedied in the new Act.

The parties are free to determine the procedure, subject to the overriding requirement of equality and a fair and reasonable opportunity to each party to present its case as stated in

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<sup>22</sup> An example, **Societe Intrafor Coloret Subtec Middle East Co MM Gagnant Guilber et al (Revue de l' Arbitrage) [1985] No.2 P 300**, and the principles were found acceptable in **Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd [1978] 1 Lloyd's Rep 357**

**Section 20** of the Act. There are also minor overriding requirements such as the requirement for pleadings, the freedom to refer and attach documents to the pleadings, the exchange of all types of documents, information and communications between the parties and reasonable advance notice of all hearings and meetings.

There is no reason as to why the parties freedom to agree cannot be a continuing freedom which can be exercised even after the arbitration process has commenced.

The parties can agree on any procedural rules for an ad hoc arbitration process or they can agree on an institutional arbitration where generally the institution's procedural rules would indirectly be construed as applicable. In that respect parties must be aware of the particular institutional rules when they agree on an institutional arbitration and perhaps the need to prescribe alternative particular rules that differ, if they so prefer. A comparison of the rules of some of the more common institutions utilized by Malaysian parties with some of the procedures prescribed by the Act as default provisions, is attached in **Appendix 1**.

Where the parties have not agreed on the procedural rules, the decision on the procedural rules reverts to the arbitral tribunal. The default mechanism in **Section 21** empowers the arbitral tribunal with a wide discretion on how to conduct the proceedings, subject to the same requirement for equality and a fair and reasonable opportunity to each party.

It is to be noted that the words "*fair and reasonable opportunity*" in **Section 20** of the Act differs from **Article 18** of the Model Law which uses the words "*full opportunity*". This suggests that there is little more flexibility in a Malaysian arbitration where speed and cost of the entire arbitration process is now fundamental to its success as an ADR. As long as both parties are subjected to the equal treatment of having a truncated or expedited process and hearings such as in the case of limited time or chess-clock arbitration processes, it is arguable that the section may not be contravened<sup>23</sup>.

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<sup>23</sup> This similar view is indicated in **Russel on Arbitration, 21<sup>st</sup> Edt (1997)** on the pari material distinction that exist with the English **Section 33 (1)(a) Arbitration Act 1996**

Implicitly, **Section 21(3)** recognises the need for supplementary rules that would fill in the gap where parties have failed to stipulate an arbitral procedure but it also provides a non-exhaustive list of powers.

**Section 21** as a whole reads as follows:-

*“21 Determination of rules of procedure*

- (1) Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*
  - (2) Where the parties fail to agree under subsection (1), the arbitral tribunal may, subject to the provisions of this Act, conduct the arbitration in such manner as it considers appropriate.*
  - (3) The power conferred upon the arbitral tribunal under subsection (2) shall include the power to –*
    - (a) determine the admissibility, relevance, materiality and weight of any evidence;*
    - (b) draw on its own knowledge and expertise;*
    - (c) .....*
- (i) make such other orders as the arbitral tribunal considers appropriate“*

It is to be noted that **Section 23(3)** preserves the arbitral tribunal’s discretion on the question and standard for admissibility, relevance, materiality and weight of any evidence and distinguishes the same from any prescribed standards within the substantive law. In Malaysia, even under the previous Act, the substantive law on these matters, which is the Evidence Act 1950, was never applicable to the arbitration process.

If the arbitral tribunal is to draw on its own knowledge and expertise on procedural matters, it is still prudent if not necessary for the parties to be informed of such knowledge and expertise and to allow the parties the opportunity to address the arbitral tribunal on it.

It is apparent that **section 21** recognises the need to allow the parties the freedom to choose and tailor the procedural rules that are to be binding on the arbitral tribunal. It is not too far

fetches to say that such a freedom accords with the autonomy of the parties and now constitutes one of the major attractions of arbitrations, especially with the recognition of many procedures that are already practiced in international arbitration that assist expedition and save cost.

Examples of these are such as the IBA Rules of Evidence, bifurcation and sub-division of the issues to allow a phased disposal of the disputes, use of experts along with the hot-tubbing process etc.

Likewise, if the parties have not agreed on the procedural rules, the arbitral tribunal can utilize a more liberal mixed procedure to suit parties from differing legal systems. The arbitral tribunal could adopt a mix of the inquisitorial and adversarial systems.

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