ARBITRATION

The Preferred Alternative

by Belden Premaraj

Arbitration – Rights based Resolution

Arbitration is a "rights based resolution process", which essentially determines the rights of the parties that are related to the disputes and offers remedies to those that have had their rights infringed.

Arbitration therefore cannot be effectively compared with an "interest based resolution process" such as mediation where the aim is not to resolve disputes by determining whether rights were truly infringed but instead is to consider positive outcomes for the parties involved regardless of the infringed rights.

Arbitration has been more than often criticized as being too traditional rights based resolution process. In *Northern Regional Health Authority v Derek Crouch Construction Company Ltd [1984] 1 QB 644*, Sir John Donaldson MR stated "*Arbitration is usually no more and no less than litigation in the private sector*." In the National Building and Construction Council Joint Working Paper (1989), NBCC Canberra, it states "*…arbitration has broken down as a cheap and efficient means of resolving construction disputes, albeit that the cause may be the strenuously adversarial manner in which the disputants themselves pursue the arbitration process."*

There are however many instances where the arbitration process has effectively resolved disputes that could only be satisfactorily resolved using the said process. Where there is a serious conflict arising from a dispute, where there are unlikely to be

any real extraneous reasons for parties to settle amicably, where the disputes are complex and require some serious technical considerations, and where a final determination will only satisfy the parties, arbitration can be the best form of a dispute resolution process. The number of occasions where these situations arise cannot be ignored.

It is admitted that an arbitration process will likely lead to polarized positions between the parties and it may likely damage the commercial relationships between the parties. It is however a fact that the parties generally arrive at the juncture of needing to commence an arbitration process when there are already polarized positions and relationships that are already strained.

Hence, whilst there is acknowledgement that other alternative dispute resolution processes may be suitable for certain types of disputes or suitable in certain types of circumstances, there must be a realization that very often, fixed term contractual relationships that are profit driven on one side and cost-saving driven on the other tend to lead to circumstances that inevitably requires a far more effective and affective dispute resolution process which is a rights based resolution.

There are some great benefits in utilizing an arbitration process when a rights based resolution is required. The freedom to choose the arbitral tribunal is an important advantage of arbitration. Parties can determine the personality, profession, qualification, experience, availability and cost of the possible arbitrators. Court litigation is on the other hand extremely uncertain with judges that may or are likely not to have any experience of various commercial fields, court systems which are able to cope with modern commercial disputes and even on occasions, tarnished with issues of corruption and lack of independence. The freedom to choose the arbitral tribunal especially in the case of a 3 arbitrator panel, allows parties the choice of arbitrators of mixed legal backgrounds. Even in the case where parties are not able to

agree, very often the appointing authority ensures that trade experienced arbitrators are appointed.

The entire arbitration process tends to lean towards an efficient and expedient determination process. The arbitrator is normally allowed to shape the procedure best suited for the disputes. In that sense, there is indeed a far greater flexibility for effective case management in arbitration. The arbitrator can introduce cost saving and time saving measures as part of the process. If the arbitrator himself is an expert of a particular field or trade, and especially where the disputes are technical and relate to the trade, there may be no need for expert evidence or the expert evidence would be rendered and dealt with in a far more efficient and speedier manner. Hearing dates are fixed well in advance and tend to be proceeded with as the arbitral tribunal ought not to have any other functions during the time allocated. As such, speedier hearings, far more effective hearings conducted without long breaks and faster determinations are the hallmark of the arbitration process. This is imperative especially where witnesses are concerned because the longer a process takes, the more likely that witnesses will be lost.

Parties are entitled to be self represented or represented by anyone including another trade expect or professional or even foreign counsels[1]. The lack of formality also adds to the ease of tensions and provides lay-persons far more comfort. The present easier legislated mode for enforcing an arbitration award has added to this positive encouragement for the arbitration process.

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

The arbitration process still effectively utilizes the adversarial method of dispute resolution but arbitrators are required to play a far greater role in the entire process thus allowing some elements of the inquisitorial system to be utilized to the benefit of a more efficient and speedier process.

An arbitration process avoids the lack of thoroughness that some of the more hybrid rights based resolution processes offer. In comparison, because documentary and oral evidence is considered, the justice is never as rough as these other processors. The arbitration process also provides for auxiliary powers to the courts to assist the process and now, the arbitral tribunal itself are provided with certain auxiliary powers to protect interim interest, to subpoena witnesses, to inspect property and subpoena and to have its own expert to assist, all of which allows for a far more thorough, effective, definitive and speedier determination. Most importantly, the law lends its weight to the arbitration process by making the determinations binding subject to limited grounds for the setting aside of the awards.

It is admitted that the arbitration process may not be suitable in instance where there is a need for legal aid, in some instance where there are multi-party disputes, class actions and event times when judicial pronouncements ate required especially in interpretation of command standard form contracts. Nevertheless, in most occasions, the disputants are best served by the arbitration process once the need for a more effective, thorough and definitive determination arises.

On the issue of costs, due to all the benefits gained in comparison to court litigation including the benefit of a quick and speedy determination, arbitration tents to be expensive. Presently, there is great encouragement for the arbitral tribunal to introduce for more effective procedure of expediting an arbitration process and keeping the cost low.

Techniques to Expedite Arbitration Process

There are some of the well-known processes or techniques employed by international arbitrators to ensure that eventually the pitfall of "justice delayed is justice denied" does not restrain the growth of international acceptance towards employing arbitration as an effective means of dispute resolution.

Whilst there are no statistics to show really how effective any or all of the techniques described herein, nevertheless there are accounts by individual arbitrators and lawyers on how successful these techniques are if introduced.

The marriage of the common law system and civil law system in international arbitration has seen the use of techniques quite common to the civil law system whilst still ensuring that the essence of the adversarial system is still maintained albeit in a limited fashion.

The systems are:-

- The use of pleadings is no longer seen as necessary. Merely an early definition of the issues by the parties with reference to the crucial and necessary documentation allows the case management time frame to be truncated.

- The terms of reference should be the settled. This essentially sets out the case to be decided by the arbitrator(s).

- Disclosure of documents is employed rather than discovery. Only limited request for production of documents that are arguably material is allowed.[2]

[2] The IBA rules of evidence

- Expert evidence by leave so that the arbitrator may ensure that only areas which truly deserve and require expert opinion is adduced.

- Experts are required to meet and report jointly.

- Bifurcation of the reference for complex arbitrations by having facts determined separately from the law and liability determined separately from the quantum or damages.

- Defined limited time for hearing, either employing a chess-clock arbitration hearing or other methods. This however requires evidence in chief to be given by way of witness statement with no further addition at the hearing. In order to ensure that the cross-examination is then limited to the most crucial matters of controversy that require oral input, witness statement in reply are allowed and even possibly further statement in reply to the reply. Therefore by employing a tiered witness statement process, some of the issues raised in the first instance may be sufficiently negated or established in order for counsel to feel safe in not cross-examining on the issue. Needless to say, for this technique to be effective, the arbitrator(s) must have read and understood the witness statements before the hearing commences.

- Hot-tubbing of witnesses or experts. This is by having a witness conferencing where the issues dealt with by both witnesses namely experts are dealt with together. The expert's cross-examination is heard back-to-back and they are encouraged to openly discuss with each other at the hearing on their differences. It is believed that such truly independent persons are more likely to concede to point when confronted by the opposing expert than when faced with an open discussion.

- If parties agree, and if it is possible, the arbitrator(s) are to give a preliminary view on their thinking as to the likely determination of particularly issues and the dispute as a whole. This can also be done at the end of the hearing before the award is actually written and issued. The reason for this technique being employed before the hearing is to allow the counsel to know what issues and evidence be should be trying to establish, Further whether before the hearing or after the hearing, if the view is presented before the parties themselves, there is a likelihood that a settlement may be parties.

- The time taken for the writing and issuance of the award is to be booked by the parties.

Other Criticisms of the Arbitration Process

There are nevertheless other criticisms of the arbitration that relates more to the in affective manner in which it is conducted rather than a criticism of using a rights based resolution system. These generally surround the issues of cost and time. It is often said that arbitration has taken a too close resembles to court litigation which essentially makes parties feel out of touch with their own dispute and part of legal hijack by the legal representatives. It is also often said that the cost of arbitration is prohibitive although it is initially shared by parties and more often than not, arbitration processes have been hijacked by parties who use deliberate delaying tactics. It is also found that on occasions where the disputes involve a myriad of technical issues as well as legal issues, arbitrators are not totally equipped to deal effectively with all the issues and the process reverts back to a process that relies far more on adversarial strengths. There is also the issue of judicial interference and lack of finality.

It is important to however note that these perceived and previously actual failures of the arbitration process have been addressed to some extent under the new Malaysian Arbitration Act 2005.

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 certain provisions 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 all parties including international parties. 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 seat of arbitration being Malaysia.

To fulfill the need for 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 still, options are provided to all parties.

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.

The Various Aspects within the Act- the Positives and Negatives

The Act now introduces a variety of provisions that address some of the criticisms that have been raised against the arbitration process. The main provisions are as follows:-

A. The courts' power to intervene or interfere with the arbitration process is now expressly limited to those only specified within the Act.

One basis of the new Act 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[3].

Previously, there was an underlying danger that the courts would interfere or intervene in an arbitration process if it perceived certain injustices created by

[3] However, the Court's power to remedy abuses such as fraud, corruption and non-observance of the rules of natural justice by the arbitrator(s) and the enforcement of arbitral awards is preserved by s.37.

the process including situations where there was multi-party disputes which could not be determined in one concurrent arbitration process[4] or if there were issues of disputes that related to fraud[5]. The courts were willing to use their perceived role as guardians of justice and their inherent powers to interfere with a arbitration process. This previous option to interfere is now curtailed.

B. The parties are given the freedom on various choices of law.

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[6]. 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. The new Act in fact requires the 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 arbitration from the procedure of arbitration, and to

[4] **Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd** [2002] 2 MLJ 71
[5] **Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat** [1996] 1 CLJ 231 and Turner v. Fenton [1982] 1 ALL ER 8.
[6] 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.

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 words "*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[7] 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[8].

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[7] 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.

[8] 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.

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 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.

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.

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".

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.

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.

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[9]. 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.

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*;

(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 the parties guaranteed freedom of choices of laws that makes arbitration a far more attractive dispute resolution process than court litigation. It is this same right to the choices of laws that allows for a more legal based and rights based resolution with some certainty.

[9] The concept of hardship under Article 6.2 of the UNIDROIT principles.

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**-*
> *(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.

… *"*

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)[10].

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.

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"[11], 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.

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[10] 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 ZincLtd 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.

[11] See footnote 3

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.

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[12].

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.*

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

[12] 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).

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 legislatory 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[13].

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?*

[13] **Dominent 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 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:-

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[14].

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?

[14] 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).

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[15] and Singapore[16].

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 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?

[15] **Fong Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd** [1991] 2 HKLR 526
[16] **Mitsui Engineering & Shipbuilding Co Ltd v PSA Corp Ltd and Another** [2003] SLR 446

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[17].

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[18].

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[19]. 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

[17] UNCITRAL Report on Adoption of Model Law
[18] 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.

[19] 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**

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.

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[20].

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 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)[21].

[20] **Dicey and Morris on the Conflict of Laws , pp. 1196-1197**
[21] Art 4(2) Rome Convention

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 (11th 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."*[22]

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.

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*

[22] **YK Fung Securities Sdn Bhd v. James Cape (Far East) Ltd (CA) [1997] 4 CLJ 300**

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[23].

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

[23] 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

determine the appropriate substantive law 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[24]. 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.

<u>The Procedural Rules</u>

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

[24] 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**

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 **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[25].

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 –*

[25] This similar view is indicated in **Russel on Arbitration, 21st Edt (1997)** on the pari material distinction that exist with the English **Section 33 (1)(a) Arbitration Act 1996**

> *(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 fetched 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.

C. There is now an option to limit judicial interference with the award.

In Malaysia, under the previous model for the *lex arbitri*, there was no distinction between domestic and international arbitration and hence judicial attitudes 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.

Under the new Act, the powers of the court to interfere with the award has now been stipulated within a provision that does not automatically apply to international arbitrations unless opted in, and does automatically apply to domestic arbitrations unless opted out. This essentially means that the parties are free to agree to have no court interferences with the award and for refusing to recognize and enforce the award. The courts are no longer empowered to set aside or remit an award due to errors of law on the fact of the award, if the

parties so choose. The limited basis are in situations where the party to the arbitration agreement was under an incapacity, the arbitration agreement is invalid under the *lex arbitri*, no proper notice of the arbitration to one party, the award deals with issues which are not arbitrable or not agreed by the parties to be arbitrated, the award contains determination beyond the scope of the arbitrator, the composition of the arbitration tribunal was not in accordance with the *lex arbitri*, the award is in conflict with Malaysian public policy, the award was induced by fraud and/or corruption and where there has been a breach of natural justice during the arbitration process or in the making of the award.[26]

Whilst the list of the various basis to set aside an award does seem long, all basis were applicable even under the previous act. In any event, the list consist of basis which generally would give rise to the setting aside of any determinations in any dispute resolution process. These basis are unlikely to appear in an average arbitration. Hence, the parties freedom to prevent the court from ever setting aside an award on the basis of an error of law on the face of the award is a positive step towards introducing finality to the arbitration process.

The only area of concern would be how the Malaysian court chooses to define what conflicts with public policy of Malaysia. There have been some bad examples in other jurisdiction where the definition has been extended to include some general perceptions that an award is unfair and unreasonable[27]. It is hoped that Malaysian courts will not follow these bad examples.

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[26] **Section 37** and **Section 39 Malaysian Arbitration Act 2005.**

[27] In Renusagar Power Co. Ltd v General Electric Co AIR 1994 SC 80, the court defined public policy to include the fundamental policies of Indian law, the interest of India and justice or morality. In Oil & Nature Gas Corp Ltd v. Saw Pipes AIR 2003 SC 2629, the court defined public policy to include where the award was patently illegal and the award is found to be so unfair and unreasonable that it shocks the

D. There is now an option to avoid any references of questions of law to the courts and in any event, there is now a very limited opportunity for such references to be made in the first place.

Under the new Act, the right for questions of law to be referred and determined by the court during the arbitration process is now curtailed. The court has now power to determine questions of law that are referred from international arbitrations unless the parties have agreed to empower the court by opting in to the specific provision. As for domestic arbitrations, the Courts are deemed to have the power unless the parties have opt out of the specific provision.[28]

Furthermore, even if the parties have chosen to empower the courts to determine questions of law during the arbitration process, the power is now curtailed by a legislated strict test that the court determination is likely to produce substantial saving in costs and will substantially affect the rights of the parties. There is also now an additional requirement for consensus between the parties for a preliminary point of law to be referred to court or the arbitral tribunal itself has consented to such a reference.

It is therefore no longer misconduct if the arbitral tribunal refuses to refer a question of law to the court when the parties are not in consensus[29].

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conscience of the court (although this authority dealt with a domestic award, its interpretation relates to a provision that applies both to international and domestic arbitration).

[28] **Section 41 Malaysian Arbitration Act 2005**.

[29] Unlike previously where it is a misconduct, **ASM Development Sdn Bhd v Arab-Malaysian Corp Builders Sdn Bhd [1998] 3 CLJ Supp 192**

As such, a party's opportunity to delay an arbitration process through references on questions of law to the courts is now very much curtailed and this is added to the fact that parties can now effe4ctively agree to avoid such an option in the first place.

E. There is now an arguable right for the arbitral tribunal to order a concurrent/consolidated arbitration processes involving multi-party split arbitrations providing they are all international arbitrations. Parties agreement is however required if any one of the multi-party split arbitrations is a domestic arbitration.

Arbitration is essentially a consensual dispute resolution process that provides for privacy and confidentiality. It has been this very same attraction of the arbitration process that has been the stumbling block towards an appropriate procedure for a multi-party dispute.

In fact, the need for such a procedure is even more imperative in the construction industry which tends to be the main user of the arbitration dispute resolution process. It is normal for mega/huge construction projects to inevitably involve the participation of various parties and professionals of various disciplines, at various levels, for example the employer or the owner, the designer (engineer or architects), the superintending officer, the main contractor, the nominated sub-contractors or sub-contractors and sub-sub-contractors, and so on and so forth. Further, the sub-contractor may have also appointed a separate designer for various aspects of their work under the sub-contract.

There is a myriad of legal relationships amongst these parties. More often than not the relationship between these parties may not be a direct contractual relationship but rather inter-connected by various contracts between one another. At the end of the day, there may not be any privity of contract between the owner and the sub-sub-contractor, although eventually it may be the sub-sub-contractor's works that the employer finds fault with.

A classic example would be where the main contractor alleges defective or incomplete design drawings causing delays and loss and expense. In such a case, the main contractor may have no choice but to make a claim against the employer for breach of contract. The employer would then have to commence its own claim against the designer.

If such a dispute were to be determined by court litigation, the employer could utilise the third party procedures prescribed by the Rules of the High Court (Order 16) and apply to include the designer as a third party to the proceedings commenced by the main contractor. The employer could claim an indemnity should the Court make a finding in favour of the main contractor on its allegations of defective or incomplete design drawings.

With the involvement of the designer as a third party, the Court will hear the matter together (concurrently or one after the other), the evidence can also be taken together from all parties and the same Judge would then have the benefit of hearing the all the allegations and defences. There would be no fear of a conflicting finding or an inconsistent judgment.

However, where the contracts contain arbitration clauses, the parties are bound to have the dispute resolved by arbitration. The position of the employer is

then jeopardized as there is no equivalent of 'third party proceedings' in arbitration. The position of the employer is jeopardized because in reality, the party who ought to be defending the main contractor's allegations is the designer and not the employer who may have totally relied on the expertise of the designer.

Evidential problems may further arise if one of the parties were a foreign party with its key personnel residing overseas. They would then be non-compellable by a court subpoena to attend the split arbitrations even as witnesses.

The above concerns are easily resolved by having a multi-party or concurrent arbitration before one and the same set of arbitrators hearing the matter at one go. It is said to be the only 'sensible solution' (Mustill and Boyd "*Commercial Arbitration*").

Nevertheless, the common law courts have refused to force a concurrent/consolidated arbitration citing that arbitration is a private affair between the parties and the fear that otherwise, it may open the floodgates and thus supposedly defeat the underlying purpose of the arbitration process i.e. quick and efficient resolution of disputes[30].

There have been instances where the court has had to deal with a split arbitration and the dangers of it producing conflicting determinations. The court has at times come up with some ingenious method to force the same arbitrator upon the various parties[31]. This option however cannot be exercised

[30] **Oxford Shipping Co. Ltd. v Nippon Yusen Kaisa (The 'Eastern Saga') [1984] 2 Lloyd's Law Reports 373** Also **WY Chin v Sarahon Construction Sdn Bhd & Anor [1994] 4 CLJ 233**

[31] **Abu Dhabi Gas Liquefaction Co. Ltd. v Eastern Bechel Corporation and Chiyoda Chemical Engineering & Construction Co. Ltd. [1982] 2 Lloyd's Law Report 425**, Lord Denning MR appointed

in the situation where one of the arbitration agreements provided for an appointing authority instead[32].

There are other instances where such an occurrence could not be avoided and there was indeed conflicting determinations. The court has had to lament it lack of power to force concurrent/consolidated arbitrations and has sought legislative resolution[33].

There are also instances where the failings of the arbitration process to cater for multi-party arbitrations was the court's basis to refuse a stay of proceedings in court where a dispute was covered under an arbitration agreement. In fact the court did go further to suggest it could restrain an arbitration proceeding in such an event[34]

The previous Malaysian Arbitration Act 1952 did not provide for the consolidation or the concurrent hearing of separate arbitrations. Unless all the relevant parties consented to the consolidation or the arbitration agreements provided for a concurrent or multi-party arbitration, the courts nor the arbitral tribunal is empowered to force a concurrent/consolidation of multi-party arbitrations.

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the same arbitrator and advised the arbitrator to utilize a procedure which allowed him to delay a determination of one arbitration till he had heard the other arbitration.

[32] **Lingkaran Luar Butterworth (Penang) Sdn Bhd v Perunding Jurutera DAH Sdn Bhd & Ors [2005] 7 MLJ 204**

[33] **Interbulk Ltd v Aiden Shipping Co. Ltd. (The "Vimeira") [1984] 2 Lloyd's Law Report 66** where Lord Justice Robert Goff in the Court of Appeal, in remitting the head arbitration award and dismissing the appeal against remission of the sub-arbitration award, recognized the dangers of such inconsistent awards in 'split arbitrations' and urged legislators to make appropriate amendments to the Arbitration Act to give a possible solutions (citing Hong Kong arbitration legislation as an example). Lord Justice Ackner was also in agreement. Also **Focke & Co Ltd (in liquidation) v Hecht & Co [1938] Lloyd's Rep 135.**

[34] **The University of Reading v Miller Construction Ltd and David Sharp [1994] 75 BLR 91**, the Court held that it has powers to grant an injunction to restrain arbitration proceedings if (i) there is no injustice to the claimant in the arbitration and (ii) it is satisfied that the continuance of the arbitration would be oppressive, vexatious or an abuse of process. This is similar to ***Bina Jati***'s case.

The Court of Appeal in ***Bina Jati Sdn. Bhd. v Sum-Projects (Bros) Sdn. Bhd. [2002] 2 MLJ 71*** seem to concur with the approach of forcing the matters to be bought to court litigation rather than arbitration. The court was willing to exercise its supervisory jurisdiction over arbitrations and arbitrator(s) (by virtue of Section 25(2) of the previous Arbitration Act 1952, paragraph 11 of the Schedule to the Courts of Judicature Act 1964 and also under Order 92 rule 4 of the Rules of the High Court to prevent injustice) and in that case it went on to state in no uncertain terms that the court could oust the jurisdiction of the arbitrator(s) in a situation when it is necessary to prevent a multiplicity of proceedings, especially where third parties, who are outside the arbitration agreement, are affected by virtue of the allegations raised in the arbitration, and where all issues ought to be tried by one single tribunal. As such, the court was of the view that if the arbitration procedure could not cater for a concurrent or multi-party arbitration, then the matters ought to be litigated in Court where third party procedures are available. There is a subsequent decision in Malaysia that suggests this decision was limited to the facts of the case where there were also disputes on fraud and Section 25(2) of the previous Act had expressly empowered the Court to revoke the arbitrator's authority in such a situation[35].

In fact, there has also been clear suggestion that the court will not grant a stay of proceedings commenced in court when the dispute is covered by an arbitration agreement where the third party procedure will most likely be resorted to[36].

[35] **Lingkaran Luar Butterworth (Penang) Sdn Bhd v Perunding Jurutera DAH Sdn Bhd & Ors [2005] 7 MLJ 204**
[36] **Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Phat** [1996] 1 CLJ 231.

Nevertheless, the weakness of the entire the arbitration process is that a concurrent or consolidated arbitration process could not be forced upon the multi-parties without their express consent.

Section 35 of the English Arbitration Act 1996 has now effectively closed the door on any possibility of allowing a concurrent or consolidated arbitration by expressly requiring the consent of the parties before it can be enforced.

The Hong Kong arbitration legislation not only recognized the problem but also provided a sensible solution to it. Section 6B of the Hong Kong Arbitration Ordinance (Cap 341) expressly provides the Courts with the power to order a concurrent arbitration where (i) there is some common question of law or facts which arises in both or all of the arbitrations; or (ii) the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or (iii) for some other reason it is desirable to make an order for a concurrent arbitration.

Similarly, in Australia under Section 26(1) of the Australian Commercial Arbitration Act 1984, the arbitrator is given the power to order a consolidation of separate arbitrations, or to have the arbitrations heard together or one after another, or to have any of the arbitrations stayed until determination of any one of the arbitrations. The power is exercised (section 26(3)) where common questions of law and fact arise in all of the arbitration proceedings; or the rights to relief claimed in all proceedings are in respect of or arise out of the same transaction or series of transaction; or for some reason it is desirable to make such orders. If the arbitrator refuses such order, the parties may apply to the Court.

In New Zealand, a similar power is provided to the arbitrators and the Court under the Second Schedule of the Arbitration Act 1996. The arbitrators or the Court is empowered to consolidate arbitrations; or hear arbitrations together or one after another; stay any of the arbitrations until determination of any other arbitration upon showing the same requisite requirements in the Australian Act.

Section 40 of the Malaysian Arbitration Act 2005 arguably seems to have empowered the arbitral tribunal to order concurrent/consolidated arbitration processes providing all muti-party split arbitrations are international arbitrations. The word "arguably" is used because there is serious concern as to the indirect construction that needs to be given to the provision in order to arrive at this conclusion.

Section 40(2) of the Act provides that unless the parties agree to confer the power to the arbitral tribunal to order a consolidated or concurrent arbitration process, there was no such power. The Act then makes this provision non-applicable to international arbitrations unless opted in.

As such, it seems that the arbitral tribunal will firstly have to make an indirect inference of the circumstances to assume that it has the power to order a consolidated or concurrent arbitration process. If it is an international arbitration, then the arbitral tribunal must construe whether by virtue of Section 40(2) not being applicable, it mean that the parties have indirectly empowered the arbitral tribunal to order a consolidated or concurrent arbitration.

There is the added problem of situation where there are different arbitral tribunals or the likelihood of different arbitral tribunals. The courts assistance would be needed to enforce a concurrent/consolidated arbitration by one arbitral tribunal. However, would and could the court come to the assistance of a parties or the arbitral tribunals so as to enforce a consolidated or concurrent arbitration in such an event? Isn't the court in any event prevented from assisting a party or an arbitral tribunal by virtue of Section 8 of the Act which only entitles the court to intervene in expressly permitted situations within the Act? How is the court to assist in any event, if it does not have the inherent jurisdiction to force a concurrent or consolidated arbitration? Will the court take an equally indirect inference that by virtue of Section 40(2) being inapplicable to international arbitrations, the arbitral tribunal is empowered to order a concurrent or consolidated arbitration process.

The Act should have expressly provided for the empowerment of the arbitral tribunal in international arbitrations and should allow the court to assist in the event that there is some administrative difficulty in ensuring a consolidated or concurrent arbitration.

In the case of domestic arbitrations, whilst it allows the parties to opt out of Section 40, it effectively provides no greater right to the domestic parties except to arguably make their agreement to a consolidated or concurrent arbitration process easier by way of the mere opting out of the said clause. Even then, based on the language that is used, it will still require an indirect construction of the agreement of the parties to a consolidated or concurrent arbitration process by virtue of the conduct of opting out of clause 40. There is also the similar problem with court assistance in enforcing a concurrent or consolidated arbitration process.

This is a most unsatisfactory use of legislative language and mode of dealing with this issue of a consolidated or concurrent arbitration process. There are legislations in other jurisdictions that could have been emulated to ensure that one of the biggest draw-backs to the arbitration process was indeed resolved by providing a discretion to either the arbitral tribunal or the courts to force a consolidated or concurrent arbitration process where it is required.

Furthermore, confusion could have been avoided if the draftsmen of the Act chose to state the positive than to state the negative whilst allowing an opt out. The Bar Council had recommended an optional provision for parties to opt in allowing the arbitral tribunal to order a consolidation of arbitral proceeding and empowering the court to assist in such a situation.

F. The appointment of the arbitral tribunal by the Director of the KLRCA in the event parties' fail to agree and the parties have not nominated an appointing authority.

This provision of a specified appointing authority[37] in the event parties fail to agree and have themselves not provided for an appointing authority is a positive step towards avoiding any delays and uncertainties on the appointment process. The previous only available option for the parties to get the court to order an appointment.

It is to be noted that under the previous only available option, the proceeding to seek the court's appointment of the arbitral tribunal would take considerable

[37] **Section 13(4), (5) & (6) Malaysian Arbitration Act 2005**

time and in the end, the appointment would simply be based upon recommendations by the parties rather than any other intellectual or considered choice.

Now as the default appointing authority is the Director of the KLRCA, this appointment can be conducted expediently without any delays to the entire arbitration process. Furthermore, there is now a provision that requires the Director of KLRCA to have due regard to the qualification of the arbitrator to be appointed, the independence and impartiality of the arbitrator, and in the case of international arbitrations, the independence of the nationality of the arbitrator[38].

G. The arbitrability of any disputes agreed to be submitted by the parties

The Act has now allowed parties to arbitrate on any disputes providing the parties have agreed to do so but subject only to public policy[39]. Public policy will generally only prevent the arbitration of disputes that carry a public interest element such as constitutional, marriage and divorce, criminal, parent and child action, registration of trademark and patent, copyright, consumer protection, environmental protection, planning, actions in rem against vessels, anti-trust, winding up and bankruptcy, trade practices, administrative actions, employment issues involving certain categories of employees etc. The above stated list is not exhaustive but it is now clear that parties can provide for an arbitration of any tort[40], trust or commercial arrangements.

[38] **Section 13 (8) Malaysian Arbitration Act 2005**
[39] **Section 4(1) Malaysian Arbitration Act 2005**.
[40] **Section 9(1) Malaysian Arbitration Act 2005** states that the arbitration agreement can deal with matters that arise out of a legal relationship not restricted to one of a contractual nature only.

H. Enhanced court support for the arbitration process by its power to stay courts proceeding

The new Act has specifically removed all discretion of the court in dealing with a dispute that is covered by an arbitration agreement upon an application by a party to stay courts proceeding.

Under the previous act, the court had a wider discretion to refuse an application for stay premised on the words "…*if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement*[41]." The courts had previously refused a stay on grounds that the disputes involved questions of fraud[42] and multi-party proceeding.

However, under the new Act[43], the only basis for the court to refuse a stay of proceeding is if the arbitration agreement is null and void, inoperative or incapable of being performed, or where there is in fact no dispute between the parties.

There has been some concern over the language used in **Section 10(1) (b) Malaysian Arbitration Act 2005** because the word "*in fact"* could be read to allow the court to undertake some form of meticulous examination of the merits of the disputes before determining whether there was indeed no dispute.

[41] **Section 6 Arbitration Act 1952**.
[42] **Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Phat** [1996] 1 CLJ 231 & **Turner v. Fenton** [1982] 1 All ER 8.
[43] **Section 10(1) Malaysian Arbitration Act 2005**

Under the previous Act, the establishment of there being no dispute was one of discretionary factors that the court could take into account in refusing a stay. However, despite there being no express provision in the previous Act that stipulated the extent of the examination of merits of the dispute when considering this question, it was settled law in Malaysia that the court would use the test of whether there was a "bona fide dispute" but without any meticulous examination of the merits. It was only in the plain and obvious cases where the issue raised by one party was frivolous or vexatious that the court would refuse a stay[44]

As such, the use of the word "*in fact*' under the new Act has drawn criticism because it leads to a potential construction that the court is being required to consider the facts in detail before assessing whether there was effectively no dispute in existence.

Nevertheless, in line with the spirit of the new Act and taking into account other jurisdictions such as England where similar wording was used in their previous act[45] and the authorities that have still construed the said words "in fact" as not adding to the previous test that did nor require a meticulous examination of the facts[46], it is hoped that the Malaysian Courts will still apply the same strict test as previously done in assessing whether there is a dispute to be referred to arbitration.

[44] **Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Phat** [1996] 1 CLJ 231
[45] **Section 1(1) English Arbitration Act 1975**.
[46] **Hayter v. Nelson & Home Insurance Co** [1990] 2 Lloyd's Rep. 31 and **Thyssen Engineering GmbH v. Higgs & Hills Plc** [1990] 23 Con LR 101 where the court in fact suggests that even matters that may be resolved by summary proceeding are in fact disputes that are being resolved through the particular procedure and hence can amount to disputes that ought to be referred to arbitration.

It is also noted that the new Act does not take the opportunity to address the definition of "*steps in proceedings*". This is perhaps because there is trite law in Malaysia as to what amounts to "*steps in proceeding"*.

I. Limited grounds for challenges against the arbitrators and the competence of the arbitral tribunal to rule on such a challenge.

The new Act now clarifies the grounds on which an arbitrator can be challenged. It now sets out the test that has to be satisfied in relation to an arbitrator's impartiality or independence before such a challenge can succeed. The test is stipulated as being "*justifiable doubt*". The test has been utilized in other jurisdiction and is stated to be of an objective nature where there is no need for proof for actual impartiality or lack of independence but merely circumstantial evidence will suffice. Nevertheless, the circumstantial evidence has to be of a strong nature. Even cumulative effects of a series of events or conduct of the arbitrator can satisfy the test[47].

There is however 2 limitations imposed on the parties' power to challenge the arbitrators. Firstly, there is a strict time frame requirement of 15 days from time of becoming aware of facts giving rise to such a challenge, for a challenge to be made by a party, failing which, it can be inferred that the right to challenge is lost[48].

[47] **Turner (east Asia) Pte Ltd v. Builders Federal (Hong Kong) Ltd** [1998] 42 BLR 122-arbitrator taking on an adversarial role; **Bithrey Construction Ltd. V. Edmunds**-arbitrator attacking counsel personally; **Diamond Lock Grabowski & partners v. Laing Investments (Bracknall) Ltd** [1992] 60 BLR 112-arbitrator obsessed with a rigid and compressed timetable; **Gas & Fuel Corporation of Victoria v. Wood Hall Ltd** [1978] VR 385-the arbitrator making mistakes of law and fact consistently and in such a setting that it becomes doubtful whether unprejudiced mind

[48] **Section 15(1) Malaysian Arbitration Act 2005**.

Secondly, a party is deemed to have waived its right to challenge an arbitrator's appointment on grounds of which the party was aware of before the party had consented or nominated the said arbitrator[49]

Under the new Act, the challenge is brought firstly before the arbitral tribunal itself and if the arbitrator in question does not withdraw himself and providing the parties then agree to the challenge, the arbitral tribunal is then empowered to rule on the challenge of any arbitrator. The Act effectively allows the challenged arbitrator himself to decide on the question of his own lack of impartiality of independence when all parties have agreed to the challenge. Whilst it may be argued that in a 3 person arbitral tribunal where one arbitrator is being challenged, the arbitrator could recluse himself from making a decision. The new Act does not however suggest that this reclusion is a necessity. The new Act also applies to a one person arbitral tribunal and hence in that situation, there is no other option but to allow the arbitrator himself to decide on the challenge against him.

In such a situation, the High Court is empowered to determine the challenge only after the arbitral tribunal has dismissed the challenge[50]. The High Court is however empowered to determine the challenge as a first recourse if the arbitrator in question does not withdraw himself and the parties are not in agreement over the challenge.

Nevertheless, empowering the arbitral tribunal to determine such issues when parties are in agreement on the challenge would arguably be contrary to the entire party autonomy structure not to mention its breach of a principle of

[49] See **Section 14(4) & Section 7 Malaysian Arbitration Act 2005**.
[50] See **Section 15(3) Malaysian Arbitration Act 2005**

natural justice termed as "*nemo judex in re sua"* which dictates that a person should not be allowed to judge in his own cause.

It is however common practice in the judicial system that a judge who is challenged is required to determine his reclusion before an appeal is allowed. In those circumstances, it is arguable that a judge being a public official of high office and reputation and where his income is not dependant on the particular disputes determined, can be trusted to be very objective over his own reclusion (although many lawyers believe that this is unlikely). An arbitrator is a different kettle of fish.

As such, it may be preferable that the determination of a challenge moves immediately to the high Court especially where all parties have agreed to the challenge.

The new Act has however introduced positive steps so that delay does not occur to an arbitration process whilst there is a challenge. Firstly, it provides that the arbitration process may continue despite there being no determination as yet on the challenge[51]. In fact the new Act allows the process to continue even till an award is made. It therefore discourages tactical challenges on spurious grounds. Nevertheless, in practice, it may not be as easy as that especially if hearings and a determination is to be proceeded with. Perhaps it is best served when there are only procedural matters to be proceeded with.

Secondly and more importantly, it prohibits any further appeal from a determination made by the High Court[52].

[51] **See Section 15(4) Malaysian Arbitration Act 2005**.
[52] **See Section 15(5) Malaysian Arbitration Act 2005**

J. Separability of Arbitration Agreement

Another great feature of the new Act is that it has made the arbitration agreement subject to the doctrine of separability[53]. This means that an arbitration clause in a contract is considered as a separate agreement, detached from the main contract, but collateral to the contract, and therefore treated as an agreement independent of the other terms of the contract.

As such, parties cannot now challenge the jurisdiction of the arbitral tribunal to determine matters that include a question as to the validity, void or illegality of the contract per se. As such, the integrity of the arbitration agreement is preserved except if the arbitration agreement itself is found to be to invalid or void, and it again prevent delaying tactics by non-genuine parties that may raise these questions of invalidity, void or illegality to avoid or hijack an arbitration process. This in effect is a codification of the modern English common law position[54].

K. Arbitral tribunal can rule on its own jurisdiction

Another feature of the new Act is the adoption of the Kompetenz-kompetenz doctrine which prescribes that an arbitral tribunal can decide on its own jurisdiction without the need of support from court[55]. Most importantly, the adoption of this doctrine prevents the court from interfering with the question of the arbitral tribunal's jurisdiction until the arbitral tribunal itself is seized of the matter and has made a determination.

[53] **See Section 18(2) Malaysian Arbitration Act 2005**
[54] See **Habour Assurance Co (UK) Ltd v. Kansa General International Insurance Co Ltd.**[1993] 3 All ER 897.
[55] **Section 18(1) Malaysian Arbitration Act 2005**.

The more important feature of the doctrine and the Act is that the arbitral tribunal is empowered to use its discretion to decide whether the question of jurisdiction can be dealt with in the award on the merits or as a preliminary question[56]. If the arbitral tribunal uses its discretion to decide that the question of jurisdiction is to be dealt with in the award on the merits, there can be no appeal to the High Court until the award is rendered. This effectively discourages any spurious tactical approach to delaying the arbitration process by challenging the arbitral tribunal's jurisdiction.

Furthermore, the new Act also empowers the arbitral tribunal to proceed with the arbitral proceeding and to make an award even if it has chosen to decide the question of jurisdiction as a preliminary question and the matter has been referred to the High Court in appeal[57]. Again, as stated on the issue of challenges against the arbitrator, this empowerment is in practice only useful if the matter that is being proceeded with is effectively procedural matters or where the arbitral tribunal is certain that the challenge on the jurisdiction is frivolous. Additionally, the Act prevents any further appeal from the decision of the high Court[58].

L. The arbitral tribunal is now empowered to make certain interim protective orders

Under the previous act, there was uncertainty as to whether an arbitral tribunal had the power to make certain interim protective orders such as security for costs, preservation and custody of the subject matter of the dispute or any interim injunction etc. The confusion was created by virtue of a provision in

[56] **Section 18(7) Malaysian Arbitration Act 2005**
[57] **Section 18(9) Malaysian Arbitration Act 2005**
[58] **Section 18(10) Malaysian Arbitration Act 2005**

the previous act that suggested that the High Court would have such powers but that the said powers was the same powers of the arbitrator[59].

Eventually, such powers were only deemed to have been conferred upon an arbitral tribunal if the parties had allowed for such powers through the procedural rules adopted and agreed by the parties.

Under the new Act, the arbitral tribunal has now been expressly empowered to order certain interim protective measures such as security for costs and the preservation/interim custody or sale of any property which is the subject matter of the dispute[60].

The High Court is still empowered to order interim measures which are of greater ambit than that allowed for the arbitral tribunal[61]. The High Court's powers have never been intended as a interference with an arbitration process but instead has been seen to be of assistance to an arbitration process. As such, it is not seen as derogating party autonomy especially for international arbitration[62]. The High Court's power includes the appointment of a receiver, securing the amount in dispute, ensuring against dissipation of assets (Mareva type remedies) and interim injunctions.

The arbitral tribunal's empowerment has its drawbacks.

Firstly, the arbitral tribunal's power under the new Act to order interim measures are very limited in its ambit or type. Secondly, a party can only seek

[59] **Section 13(6) Arbitration Act 1952**
[60] **Section 19(1) Arbitration Act 2005**
[61] **Section 13(6) Arbitration Act 1952**
[62] **Thye Hin Enterprises Sdn Bhd v. DaimlerChrysler Malaysia Sdn Bhd** [2004] 1 MLJ 293 and **Channel Tunnel Group Ltd and another v. Balfour Beatty Construction Ltd and others** [1993] 1 All ER 664.

an order after the arbitral tribunal has been constituted. Parties who therefore require urgent interim protective measures before the arbitral tribunal is constituted have no choice but to seek such protection from the High Court.

Thirdly, even if the arbitral tribunal has been constituted, it is noted that the new Act does not empower the arbitral tribunal to hear and order the limited interim protective measures through an *ex parte* process.

The UNCITRAL Model Law provides a far wider ambit of interim measures that can be ordered by the arbitral tribunal[63].

There has been further development in the Model Law to allow for ex parte hearings and orders. The Working Group New Draft Chapter IV after the 44th Session in January 2006 proposed certain modification to Article 17 of the Model Law to provide certain guidelines on the power to grant interim relief:-

- The interim relief must relate to either maintaining or restoring the status quo pending determination
- It is granted to prevent current or imminent harm or prejudice to the arbitral process
- The interim relief can be for the preservation of assets but only if it is for the purposes of satisfying an award
- The interim relief can be for the preservation of relevant and material evidence (Anton Pillar)
- The pre-requisite must be that greater harm is likely to result which cannot be adequately rectified by the award of damages and it

[63] Art 17 reads "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the disputes. The arbitral may require any party to provide appropriate security in connection with such measure"

substantially outweighs any harm to the party against whom the measure is granted

- The pre-requisite must also be that there is a reasonable possibility of success on the merits (not applicable for interim relief related to the preservation of evidence)

As for the question on whether the arbitral tribunal should be allowed to order *ex-parte* interim reliefs, there is still no agreement within the Working Committee. The arguments for and against are well balanced.

On the one hand, it is said that the power to make ex-parte relief will equate the practices and power of the court, it will be more difficult to enforce, it will cause eventual delays in enforcement, it would contravene public policy and autonomy of the parties in arbitration, it would contravene the provision that requires equal treatment between the parties and full opportunity to present one's case, it would contrive the provision that requires all documentations to be communicated between the parties and it would contravene the provisions that allows the courts to refuse an enforcement of an award when a party is not given notice. It can be seen tat if any *ex parte* powers are to be allowed, there would have to be some extensive amendments to many of the articles within the Model Law.

The arguments for empowering the arbitral tribunal with a right to order *ex-parte* interim reliefs are equally forceful. There is a draft of a revised Article 17 of the Model Law that sets out such powers and it provides the necessary limitations to ensure no abuse. The limitations include requirements such as a

life span of 20 days, that the other party be heard at the earliest practical time, that the tribunal is to decide promptly on any objection by the other party, that

there be some mandatory security covering the measures granted, that all facts be disclosed and that there be a pre-requisite that the arbitral tribunal be satisfies that any prior disclosure would risk frustrating the purpose of the relief.

There is also strong argument in support of *ex parte* powers by virtue of the fact that the Model Law has seen it fit to entrust the arbitral tribunal to make an *ex parte* award[64].

M. Arbitral tribunal can appoint its own experts

Section 28 of the **Arbitration Act 2005** deals with experts appointed by arbitral tribunal itself. It expressly provides for expert witnesses to be appointed by the arbitral tribunal, the parties' duties towards such experts and the expert's duty to participate in a hearing on request. The expert's fee is of course considered as part of the procedural cost.

There is nothing unusual with the arbitral tribunal appointing the expert since provisions exist for the court to do likewise. This is provided under **Order 40** of the **Rules of the high Court 1980**. Prior to the **Arbitration Act 2005,** institutional rules such as ICC Rules, UNCITRAL rules and even PAM rules (but subject to parties consent) have provided this power to the arbitral tribunal. However, controversy still looms especially on whether the arbitral tribunal has then replaced its decision making functions with that of its expert.

The extent to which, as a matter of principle, an arbitral tribunal should risk being seen to remove the garb of the neutral umpire by actually calling expert witnesses is therefore extremely controversial.

[64] **Article 25 of the Model Law and Section 27 Malaysian Arbitration Act 2005**.

Lord Denning MR in **Re Saxton** [1962] 1 WLR 968 at 972, speaking in the context of the judicial power to appoint experts, was far from positive about the utility of judicial intrusion into the adversarial arena:

> *"it is said to be a rare thing for it to be done. I suppose that litigants realize that the court would attach great weight to the report of a court expert, and are reluctant thus to leave the decision of the case so much in his hands. If his report is against one side, that side will wish to call its own expert to contradict him, and then the other side will wish to call one too. So it would only mean that the parties would call their own experts as well. In the circumstances, the parties usually prefer to have the judge decide on the evidence of experts on either side, without resort to a court expert"*

In the USA, **rule 706** of the *Federal Rules of Evidence* 1975 (US) provides for court appointment of expert witness but that it has almost fallen into disuse. In **Kian v. Mirro Aluminium Co** 88 FRD 351 at 356 (Mich 1980) the reason was highlighted: *"The presence of a court-sponsored witness, who would most certainly create a strong, if not overwhelming, impression of impartiality and objectivity, could potentially transform a trial by jury into a trial by witness."*

This is likely the reason why **Order 40** is practically unused in the Malaysia jurisdiction. It smacks of a civil inquisitorial attitude rather than an adversarial attitude.

On the other hand, in **R v. Jenkins: ex parte Morrison** [1949] VLR 277, Barry J in calling in aid the service of an assessor to aid the court under what was then s.123 of the *Supreme Court Act 1928 (vic)*, held that:

> *"....where the judge appoints an expert [to aid in examination of the welfare of a child] he is really supplementing by scientific technique the natural limitations of his own powers of observation. The expert is skilled in the experiment which can be observed and checked by the parties if they so desire; and in the proper exercise of its discretion the court would always allow the parties the opportunity of cross-examination."*

It must also be recognized that an expert appointed by the arbitral tribunal will also save much time and expense in the arbitration as the expert may be able to better crystallize or focus the issues than the adversarial lawyers. The arbitral tribunal appointed experts should meet the parties' experts and work with them to come to an agreed list of issues as well as a list of matter agreed.

Nevertheless, in order to avoid any aspersions of a replacement determiner, the arbitral tribunal ought to:-

- Ensure the expert appointed meets the same standard of competence and impartiality as expected of the tribunal;

- Attempt to get the parties to agree on the identity of the experts

- Set out in writing the scope of the expert

- The opinion sought should be limited to the experts competence without any conclusion as to the parties' case itself (i.e. no finding of breach of negligence etc)

- The procedures to be adhered must be done *inter partes* such as when the expert is allowed to examine or inspect physical evidence

- The report should be provided to the parties

- Parties be encouraged to question the expert

In conclusion, whilst it is acknowledged that the arbitration process has its shortcomings, there have been great strides both in international and domestic arbitration processes to improve its perceived failing relating to the expediency of the process and the expenses involved. There has been a clear move towards adopting procedural approaches that would allow for a more efficient process and this should be satisfactory to parties that are serious about resolving their disputes in a thorough but cost effective manner.