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Arbitration Act 2005: Malaysia Joins the Model Law Arbitration Community

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Introduction

Arbitration is an important part of commercial life and every legal system must to some degree be concerned with it. The business and arbitral communities in Malaysia had long clamoured for a total revision and updating of the Arbitration Act 1952. Malaysia's arbitration legislation has now seen a major overhaul with the passing of the Arbitration Act 2005.

The Arbitration Act 2005, Act 646 (the new Act) received the Royal Assent on December 30, 2005 and was published in the *Gazette* on December 31, 2005. The Minister has fixed the commencement date as March 15, 2006 and thus, the current 1952 Act (the old Act) will only continue to apply to arbitrations which have already commenced, and the new Act will apply to all other arbitrations. It is therefore timely for practitioners in the arbitration field to take a close look at the new Act. In what material ways does the new Act depart from the old?

Following the pattern of the time, the old Act was based almost word for word on the English Arbitration Act of 1950. While the old Act had the merits of simplicity and clarity, it was long outdated. With the increasing emphasis on arbitrations, there was more and more judicial grist exposing the infirmities, shortcomings and lacunae found in the old Act. It has remained virtually unchanged for over half a century; the major amendments made by the English Acts of 1979 and 1996 and similar Acts in other common law countries have up to now escaped us.

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In the last decade, numerous bodies in the country involved in arbitration have submitted proposals and have been engaged in discussions with the Attorney General's office to revamp the Act. The ultimate aim was to have an Act that is moving with the times. The Bar Council Malaysia advocated a single enactment based on Model Law with some additional provisions for domestic arbitration. On the other hand, the Malaysian Institute of Arbitrators proposed the enactment of two separate Acts – one based on Model Law for international arbitrations and the other based on the English Arbitration Act 1996 for domestic arbitrations.

The common ground was general agreement that the time has come for a wholesale revamp of the old Act in Malaysia; one option would have been to follow the format of the English 1996 Act; it is clear however that the government decided against this approach; instead the government has clearly opted for a single Act based on the Model Law. For those unfamiliar with the Model Law, a short explanation may be appropriate.

The UNCITRAL Model Law (Model Law)

The full title of the document is the UNCITRAL Model Law on International Commercial Arbitrations and it was adopted by the United Nations Commission on International Trade Law on June 21, 1995. The explanatory note by the UN Secretariat in relation to the Model Law opens with the following general remarks:

1. The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the close of the Commission's 18th annual session. The General Assembly, in its resolution 40/72 of 11 December 1985, recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.
2. The Model Law constitutes a sound and promising basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world.
3. The form of a model law was chosen as the vehicle for harmonization and improvement in view of the flexibility it gives to States in preparing new arbitration laws. It is advisable to follow the model as closely as possible since that would be the best contribution to the desired harmonization and in the best interest of the users of international arbitration, who are primarily foreign parties and their lawyers.

The adoption of the Model Law is, unlike the New York Convention, not a treaty obligation. It is nevertheless recommended for adoption by UN members, who are free to amend it to suit their own requirements. However more and more countries have adopted Model Law as the basis of their arbitral regime. This has in turn led to a corpus of law and practice that has developed from it, and from conscious and unconscious parallelism in judicial thinking in different jurisdictions. It is therefore commendable that Malaysia has now joined the Model Law arbitral community.

Although the Model Law was drafted primarily with international arbitrations in mind, the explanatory note of the UN Secretariat goes on to state:

> In accordance with the mandate of the Commission, the Model Law is designed to establish a special regime for international cases. It is in these cases that the present disparity between national laws creates difficulties and adversely affects the functioning of the arbitral process. Furthermore, in these cases more flexible and liberal rules are needed in order to overcome local constrains and peculiarities. Finally, in these cases the interest of a State in maintaining that its traditional concepts are familiar rules is less strong than in a strictly domestic setting. *However, despite this design and legislative self-restraint, any State is free to take the Model Law, whether immediately or at a later stage, as a model for legislation on domestic arbitration and, thus, avoid a dichotomy within its arbitration law*.

Many countries have followed this suggestion, including India and others in the common law world. One of the countries which has adopted this suggestion is New Zealand. Section 5 of the New Zealand Arbitration Act 1966 states:

> The purposes of this Act are –
>
> (a) To encourage the use of arbitration as an agreed method of resolving commercial and other disputes; and
>
> (b) To promote international consistency of arbitral regimes based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on the 21st day of June 1985; and
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> (c) To promote consistency between the international and domestic arbitral regimes in New Zealand; and
>
> (d) To redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards; and
>
> (e) To facilitate the recognition and enforcement of arbitration agreements and arbitral awards; and

(f) To give effect to the obligations of the Government of New Zealand under the Protocol on Arbitration Clauses (1923), the Convention on the Execution of Foreign Agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration.

In his address at the Kuala Lumpur Regional Centre for Arbitration (KLRCA) International Conference held on October 14, 2003, David Williams QC, a leading New Zealand practitioner in the arbitration field, testified to the success of this approach in New Zealand.

The philosophy behind the New Zealand Act has been closely followed in the new Act.

The first principle appears to be the adoption of the Model Law with suitable amendments to apply to all arbitrations, both international and domestic, although, unlike the New Zealand Act and the Singapore International Arbitration Act, the Model Law is not mentioned anywhere in the text. This is more a matter of style rather than substance.

However, again following the approach of the New Zealand Act, it has been recognised that while the Model Law is generally perfectly suited for the domestic regime, there is a need to differentiate between the international and domestic regimes for certain limited purposes.

Format of the new Act

The new Arbitration Act contains four parts:

Part I – Preliminary

Part II – Arbitration

Part III – Additional provisions relating to arbitration

Part IV – Miscellaneous

Part I contains five sections which deal with commencement, interpretation, application to arbitration and awards in Malaysia, arbitrability of subject matter, and the applicability of the Act to government.

The key provision in Part I is s 3. This states that:

> Parts I, II and IV apply to all arbitrations, where the seat of the arbitration is Malaysia.
>
> Part III however applies to domestic arbitrations unless the parties “opt out”, but only to international arbitrations if the parties “opt in”.

Part II is the core of the Act. A comparison of the index to Part II of the new Act (ss 6-39) shows that it follows section by section and in the same order the subject

headings of ss 3-36 of the Model Law. The variations in the text from the Model Law can therefore be easily identified. This part deals among other things, with general provisions as regard to communications, waiver and extent of court intervention, and with arbitration agreement, composition of arbitral tribunal; jurisdiction of arbitral tribunal; conduct of arbitral proceedings, making of award and termination of proceedings; recourse against award; and recognition and enforcement of awards.

Part III contains 7 sections which are not found in the Model Law and, as already explained, only apply to domestic arbitrations subject to the opting out and opting in principle. The sections deal with additional powers to supervise and/or support arbitration proceedings including the consolidation of arbitral proceedings; determination of preliminary points of law; appeals on questions of law; costs and expenses of an arbitration; and extension of time for commencing arbitration proceedings and for making award. The key provision in this section is the section which deals with appeals on points of law.

Part IV contains 5 sections which deal with miscellaneous provisions such as liability of arbitrator, immunity of arbitral institutions, bankruptcy, model of application, repeal and savings.

The definition of international arbitration

Because of the need to differentiate for limited purposes, the first question which will arise is whether the particular arbitration comes within the definition of "international arbitration" as defined in s 2 of the Act; if not, it will come under the definition of "domestic arbitration" which is defined to mean "any arbitration which is not an international arbitration".

The definition of "international arbitration" in the new Act is as follows:

> "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; or
>
> (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.

In drafting the definition, the government has wisely followed closely the definition in the Model Law, so that whatever may be the shortcomings of the definition, the same basic definition will be generally applied by all countries which have adopted the Model Law.

One sensible departure from the Model Law definition has been adopted from the Singapore International Arbitration Act (No 23 of 1994) (Cap 143A). In s 5, the Model Law definition of International Arbitration, the first limb reads:

> the parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different States.

As pointed out in the commentary to the Singapore International Arbitration Act, this leads to the illogical consequence that if both parties to an arbitration come from the same foreign country, the arbitration will be deemed to be domestic. Under the amended definition in the Singapore Act as followed in paragraph (a) of the definition of "international arbitration" in the new Act, this illogicality is avoided and the arbitration will be classed as international.

Different provisions applying to international and domestic arbitrations

The first major difference arises out of s 3 of the new Act, which we have already referred to above. Part III (ss 40-46) will apply to domestic arbitrations, unless the parties have "opted out", but will not apply to international arbitrations unless the parties have "opted in". This format follows closely the New Zealand model. Part III contains provisions which are not in the Model Law. Easily the most important of these is s 42 which provides for references to the High Court on points of law arising during and after the arbitration. The rationale for the distinction is that the policy of the Model Law is to restrict references or recourse to the local courts to issues of jurisdiction and public policy in international arbitrations: whereas some recourse to the courts on issues of law in domestic arbitrations is still considered necessary and desirable particularly bearing in mind that many arbitrations arising out of standard form construction contracts are decided by domestic arbitration, where the courts' guidance on matters of interpretation can be obtained as precedents.

The "opting in" and "opting out" provisions are in keeping with the modern trend towards party autonomy in the arbitration field.

The second area of differentiation is found in s 12 which deals with the number of arbitrators where the arbitration agreement is silent or the machinery in the arbitration agreement fails. In international arbitrations, the number is fixed at three (following the Model Law provision). In domestic arbitrations, the number is fixed at one (following the old Act). We believe that the rationale for this distinction is that domestic arbitrations would generally tend to involve lesser quantum, where cost is a significant factor.

The next area of differentiation is s 30, which refers to the substantive law to be applied to the arbitration. Whereas in the case of international arbitrations, the substantive law will be decided on the basis of common law principles for determining "the proper law", in the case of domestic arbitrations, Malaysian substantive law is mandated by s 30(1). We regard s 30(1) as an unfortunate infringement on the principle of party autonomy. Why should the parties not be free to choose their own substantive law, as is the case under the old Act and is even the position in the High Court where the court is obliged to apply the "proper law" of the contract? In this connection it has to be recognised that, in this country foreign parties often contract with Malaysian parties through local subsidiaries; in such case, any arbitration will often come within the definition of domestic. Yet it is also common for the party to have negotiated for the contract to be governed by a "neutral" law with which the parties are more comfortable, for example English law. Why should this be disallowed?

This unusual provision could have the effect of discouraging the parties from agreeing to a Malaysian seat of arbitration.

The final point of distinction comes in ss 38 and 39 of the new Act, which now provides a uniform process for recognition and enforcement of arbitral awards, thus combining the processes currently provided by the old Act and by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act (the New York Convention Act). Section 38(1) states that the process applies to awards made "in respect of a domestic arbitration" and awards "from a foreign state" which is a party to the New York Convention. What is the position in the case of awards made in Malaysia in respect of international arbitrations? It is submitted that in the context of s 38, the word "domestic" is intended to be used in contradistinction to the awards of a foreign state and should be construed as applying to all awards made in Malaysia. This is therefore a case where a different interpretation should be put to that contained in s 2, because the "context otherwise requires", to avoid a lacuna in the Act.

Applicability of new Act to foreign arbitrations

One unfortunate omission in the new Act is a provision along the lines of article 1(2) of the Model Law and s 7 of the New Zealand Act, which clarifies which sections, if any, are applicable to arbitrations held outside Malaysia.

Under the Model Law and the New Zealand Act, only four provisions are stated to apply to arbitrations held outside Malaysia. The equivalent provisions in the new Act are the following sections:

10. Arbitration agreement and substantive claim before the Court
11. Arbitration agreement and interim measures by High Court
38. Recognition and enforcement
39. Grounds for refusing recognition enforcement

We do not see a problem with ss 38 and 39 since it is clear from the text that these provisions do apply to awards made in a foreign New York Convention country, but the position in regard to ss 10 and 11 is not so clear.

It may be argued that s 3 of the new Act contemplates its application only to arbitrations where the seat of arbitration is held in Malaysia, and therefore that s 10 will only provide for a stay of court proceedings where the arbitration is to be held in Malaysia. If that argument is upheld, there would appear to be a non compliance by Malaysia with article II.3 of the New York Convention which requires a mandatory stay to be provided for where the arbitration is to be held in a Convention country. At present, this article is enforced through s 6 of the New York Convention Act, which provides for a mandatory stay in overriding s 6 of the old Act.

However it can also be persuasively argued that s 10 of the new Act should be construed widely so as to include the obligation to grant a stay of court proceedings in aid of a foreign arbitration so as to comply with Malaysia's treaty obligations under the New York Convention.

In view of this ambiguity, we are of the view that consideration should be given to amending the new Act to clarify the position.

Turning to s 11, it is to be noted that in the case of *Marriott International Inc v Ansal Hotel Ltd*,[1] the Indian High Court held that under the equivalent section in the Indian Arbitration and Conciliation Act (26 of 1996) it had no power to grant interim relief in support of an arbitration to be held overseas.

The *Marriott* case deals with an arbitration pursuant to an agreement governed by Indian law, but where the arbitration was being held in the KLRCA, Kuala Lumpur. One of the parties sought interim relief in the Indian courts under s 9 of the Arbitration and Conciliation Act (26 of 1996), which is equivalent to s 11 of the new Act and article 9 of the Model Law.

The Indian court rejected the application on the grounds of lack of jurisdiction. The court noted that article 1(2) of the Model Law provides for article 9 to apply to overseas arbitrations, but found that this sub-article had not been included in the Indian Act. It is likely that a Malaysian court would come to the same conclusion if faced with a similar set of circumstances under the new Act.

The effect of s 8 of the new Act

This provision follows closely article 5 of the Model Law. Its purpose is obvious. Parties who agree to an arbitration in a country other than their own expect any dispute to be settled by the arbitral process; the adoption of the Model Law by most countries gives confidence that the independence of the arbitration will be

1 AIR 2000 Delhi 377.

respected. The last thing a party wants in this situation is for the arbitration to be hijacked by the courts of the foreign country. Hence the decision to follow the Model Law on this issue is to be applauded. The fact that the new Act provides for "opting in" to the provisions of Part III does not impinge on the principle because the opting in, in the probably rare situations when it happens, will be the free choice of the parties to the arbitration.

Having said this, the words "unless otherwise provided" in s 8 need also to be emphasised. Neither the Model Law nor the new Act provide for the total ouster of the local courts. Both contain several provisions which provide a role for the local courts mainly in support of the arbitration viz:

(i) the stay provisions (clause 10);

(ii) interim measures of protection (s 11);

(iii) challenge to appointment of arbitrator in absence or failure of agreed procedure (s 15);

(iv) court assistance in taking of evidence (s 29);

(v) setting aside the award on grounds of jurisdiction or public policy (s 37);

(vi) enforcement of awards (ss 38 and 39);

(vii) in the case of domestic arbitrations, references on points of law (ss 41 and 42).

Does this section exclude the use by the court of inherent powers to intervene in arbitration, such as was done in the Court of Appeal case of *Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd*?[2] In our view the court has no inherent powers to intervene in arbitration. This was made clear in the Court of Appeal decision in *Sarawak Shell v PPES Oil and Gas Sdn Bhd*[3] where Shankar JCA delivering the judgment of the court followed the House of Lords decision in *Bremer Vulcan v South India Shipping Corp*.[4]

As between the two conflicting decisions of the Court of Appeal on this issue, the *Sarawak Shell* decision in our view represents the correct position in law and s 8 of the new Act, which clearly favours that approach, should strengthen the argument.

Section 10: The stay provision

Section 10, which follows Model Law article 8, basically makes the stay mandatory where there is a bona fide dispute and removes the discretion to retain the proceedings in court given by s 6 of the old Act.

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2 [2002] 1 AMR 666; [2002] 2 MLJ 71.
3 [1998] 2 AMR 1914; [1998] 2 MLJ 20.
4 [1981] 1 All ER 289.

The stay is now mandatory provided it is made before taking any other steps in the action, unless:

(a) the agreement is null and void, inoperative or incapable of being performed; or

(b) that there is in fact no dispute between the parties.

We are of the opinion that the decision of the Federal Court in *Sanwell Corporation v Trans Resources Corporation Sdn Bhd*,[5] which held that entering an unconditional appearance was not taking a step in the action should continue to apply to the new section.

Paragraph (a) above is found in article 8(1) of the Model Law, but paragraph (b) is not in the Model Law. It gives the court a limited discretion to refuse stay when it finds "that there is in fact no dispute between the parties with regard to the matters to be referred". This seemingly sensible addition, which is also included in the New Zealand Act, came in for severe criticism by Thompson J in the New Zealand case of *Todd Energy v Kiwi Power*[6] on the grounds that it will oblige the courts to entertain summary judgment type arguments as to whether there is a serious issue in dispute, and to entertain separate but overlapping applications for stay and summary judgments. In our view this situation can be avoided if the distinction is made between the contention that no dispute exists and the contention that, although a dispute exists, it is not worthy of any merit.

We have already referred to the issue of whether s 10 applies to applications for a stay in support of an overseas arbitration.

Interim measures of protection

This subject is now covered by s 11 which follows article 9 of the Model Law and deals with the powers of the High Court and s 19, which follows article 17 of the Model Law and deals with the powers of the arbitral tribunal. In both cases the new Act has expanded on the Model Law provisions by providing for specific powers.

In contrast to s 12 of the Singapore International Arbitration Act 1994, where wide powers are given to the arbitral tribunal, including "Mareva" type powers to prevent the dissipation of assets, the new Act has taken a more conservative approach. Limited powers are given to the arbitral tribunal under s 19, and wider powers to the High Court. In particular powers to prevent the dissipation of assets is left with the High Court. We consider this to be more appropriate especially since the arbitral tribunal has no power to enforce its award on persons who are not parties to the arbitration.

5 [2002] 2 AMR 2257; [2002] 3 CLJ 213.
6 CP 46/10, 29.10.01.

The new Act is silent on the question of whether the arbitral tribunal can award interim measures on a true ex parte application i.e. without notice having been given to the other side. Having regard to the overriding provision of s 20 which requires each party to be treated with equality and given a fair and reasonable opportunity of presenting its case, we believe the better view is that the arbitral tribunal has no such power, and that is as it should be: the parties should resort to the High Court for the exercise of its wider powers in such situation.

With the overlap of power between the High Court and the arbitral tribunal, there always exists the possibility of conflict where one party chooses to go to the High Court and the other to the arbitral tribunal. There is also always the possibility that one may try to stifle the arbitration by reference to the court or the court itself may be tempted to enforce its view on the arbitrators. The new Act does not attempt to deal with these situations, but in exercising its powers under s 11, the High Court would be well advised to follow the guidance given by Lord Mustill in the case of *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*[7] in the following passage at p 364H:

> Secondly the injunction claimed in *Bremer Vulkan* would have involved a direct interference by the court in the arbitral process, and thus an infringement of the parties' agreement that the conduct of the dispute should be entrusted to the arbitrators alone, subject only to the limited degree of judicial control implicit in the choice of English law, and hence of English statute law, as part of the curial law of the contract. The purpose of interim measures of protection, by contrast, is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration.

and at p 367G in the following passage:

> There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made, and not to take out of the hands of the arbitrators (or other decision-makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter consideration must prevail. The court has stayed the action so that the panel and the arbitrators can decide whether to

7 [1993] AC 334.

> order a final mandatory injunction. If the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide.

We have already dealt with the issue of whether s 11 applies to allow the High Court to grant interim measures of protection in aid of foreign arbitrations.

The role of Kuala Lumpur Regional Centre for Arbitration (KLRCA)

Under the new Act, the special position given to the KLRCA by virtue of s 34 of the old Act has disappeared and become past history. This is long overdue. Under the new Act the same law applies to all international arbitration whether held under KLRCA rules, under ICC Rules or under any other arbitral regime. Similarly under the new Act, the same law applies to all domestic arbitrations whether held under KLRCA rules, under PAM Rules or under any other arbitral regime.

However in place of s 34, the KLRCA has a new role as the appointing authority for arbitrators, where either there is no agreed procedure in the arbitration agreement or the procedure agreed for any reason fails.[8] This is consistent with article 6 of the Model Law which leaves it to the individual countries to decide which court or other authority is to be competent to carry out the various functions which the Model Law leaves with the "court or other authority". In appointing the KLRCA to perform this function, the government has followed the lead of the Singapore International Arbitration Act which gives the power to the Singapore International Arbitration Centre.

The director is required to act expeditiously within 30 days, failing which the parties can apply to the High Court for such appointment. The director is also by s 13(8) required to consider the qualification, independence and nationality before making any appointment; he is not expressly required to seek the views of the parties, but this obligation can be implied from s 13(8).

Section 18: Competence of Arbitral Tribunal to rule on its own jurisdiction

This section which follows article 16 of the Model Law and is also similar to s 30 of the English Act 1996, empowers the arbitral tribunal to rule on its own jurisdiction following the doctrine of "Kompetenz Kompetenz". Subsection 18(2) also deals with the doctrine of separability. Any ruling by the arbitral tribunal under this section is subject to the rights of appeal to the High Court provided by s 18(8).

Section 18(2) provides for the separability or autonomy of the arbitration clause which seeks to preserve the arbitral process. It means that the arbitration clause in the contract is to be considered a separate agreement, detached from the main

8 See s 13 of the new Act.

contract, and therefore has to be treated as an agreement independent of the other terms of the contract.[9] The arbitration agreement within the contract is separate from that of the contract. In other words, the validity of the arbitration clause does not depend on the validity of the contract. The arbitration clause by surviving the demise of the main contract then constitutes the necessary agreement of the parties that any disputes or differences between them should be referred to arbitration.

The doctrine of separability or autonomy of the arbitration clause as provided in s 18(2) is the legal basis for the appointment of the arbitrator. If an arbitrator is to decide on his own jurisdiction, he must first assume jurisdiction. It allows the question of a total jurisdictional challenge then to be decided by the arbitration as provided in the rest of s 18.[10]

The section differentiates between pleas that the arbitral tribunal does not have jurisdiction, which must be raised not later than the submission of the statement of defence (s 18(3)); and pleas that the arbitral tribunal is exceeding the scope of its authority (for example by entertaining an amendment to the pleading outside the scope of the initial reference), which should be made as soon as the matter complained of becomes an issue.

Does this mean that the "passive remedy" as explained by Edgar Joseph Jr FCJ in the Supreme Court case of *State Government of Sarawak v Chin Hwa Engineering Development Co*,[11] which allows a party the keep silent and raise objection to jurisdiction only at enforcement stage, will no longer be available under the new Act?

The position under the English Act is very clear. It contains a special s 73 which is headed "loss of right to object" and which applies inter alia to pleas of lack of substantive jurisdiction. It provides that where a party has failed to raise an objection within the time limits set, he may not raise the objection later; and where the arbitral tribunal rules that it has substantive jurisdiction and a party who could have questioned that ruling failed to do so within the time allowed, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling. Section 66(3) of the Act which deals with enforcement of awards specifically provides that the right of enforcement may have been lost by virtue of s 73.

The position under the Model Law and under the Singapore International Arbitration Act and the new Act, which basically follow the Model Law, is not

9 See Peter Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions*, 1st edn, 2000, paragraph 4.009, p 110.

10 See Redfern, Hunter, Blackaby and Partasides, *Law and Practice of International Commercial Arbitration*, 4th edn, Sweet and Maxwell, p 299.

11 [1995] 3 AMR 2707; [1995] 4 CLJ 1.

so clear. The time limits for objection to jurisdiction before the arbitral tribunal and for appeal to the High Court are set, but there is no equivalent to the English provisions specifically dealing with loss of the right to object at a later stage including enforcement stage. However the explanatory statement to the Singapore International Act expresses the view that:

> although not expressly stated in the Model Law a party who fails to raise a plea as required by article 16(2) [the equivalent of s 18(3) and (5)] is implicitly precluded from raising such objections not only during the later stages of the arbitral proceedings but also in other contexts, for example in setting aside or enforcement proceedings, unless the objection relates to defects such as violation of public policy or non arbitrality. Such defects cannot be cured by submission to the proceedings and are not therefore subject to the time limits in paragraph (2).

This approach suggests that the "passive remedy" may still be available in certain instances for purposes of an application to set aside an award under s 37 or to contest an application to enforce an award under s 39 of the new Act. It remains to be seen the extent to which the distinction made in the Singapore "explanatory statement" will be accepted by the courts.

Finally it should be noted that, while an appeal to the High Court against a ruling that it has jurisdiction cannot be further appealed by virtue of s 18(10), there is no such limitation in the case of a High Court ruling under s 37 or 39.

Section 26: Hearings

This section gives the arbitral tribunal great flexibility in the conduct of proceedings. It does not for example insist that all the claimant's evidence must be heard before the respondents evidence or prevent the expert's evidence being heard together in a separate hearing. It also allows the arbitral tribunal to insist in advance on witness statements and submissions on law. It recognises in this context that time is an important consideration and that in the modern age, parties do not have the luxury of taking as much time as they want. It does not on the other hand specifically provide for "chess-clock" procedures, where each party is given a specific time limit, and arbitral tribunals would be well advised to adopt such procedures only by agreement to avoid complaints of breach of natural justice.

In practice the limits on the arbitral panel's power to be master of its own procedure can be summarised as:

(a) the requirement laid down by s 26(2) that there must be "*oral hearings at an appropriate stage of the proceedings*", unless the parties agree otherwise.

(b) that all times the parties are to be treated with equality and each party is to be given a fair and reasonable opportunity of presenting his case, as is mandated by s 20 of the new Act.

It is suggested that s 20 is really an overriding provision which must at all times be in the forefront of the tribunal's mind, and that the requirements of s 26(3), (4) and (5) are simply specific applications of this principle. Failure to follow this overriding principle may lead to an application for setting aside an award under s 37(1) and (2) of the new Act.

Section 33: Form and content of award

Section 33(5) of the new Act follows exactly the wording of article 31(4) of the Model Law. It makes it a mandatory obligation for the arbitral tribunal to deliver a copy of the award to each party.

Does this mean that, in view of the statutory obligation, the arbitrator cannot withhold delivery of the award and claim a lien on the award for unpaid fees? At least in the case of domestic arbitrations, this remedy is impliedly preserved by s 44(4), which empowers the High Court to impose conditions on the delivery of the award.

Section 33(6) is not in the Model Law. This subsection deals only with awards of interest from the date of award to date of realisation. It does not put any limit on the quantum of interest nor does it specifically outlaw compound interest. It is therefore wider than Order 42 r 12 of the Rules of the High Court; that rule provides for every judgment debt to carry interest from date of judgment at a maximum rate of 8% unless a higher rate has been agreed between the parties, in which case that higher rate can be included in the judgment. It is also wider than the equivalent section in the Singapore International Arbitration Act, which provides for awards to carry interest at the same rate as a judgment debt.

There is no provision in the new Act for awards of interest up to the date of the award. In the courts, this area is covered by s 11 of the Civil Law Act 1956, which reads as follows:

> In any proceedings tried in any Court for the recovery of any debt or damages, the Court, may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section –
>
> (a) shall authorise the giving of interest upon interest;
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

Although there is no specific provision in the new Act for the giving of pre-award interest, we are of the view that the arbitral tribunal has the same power to do so as the court under s 11 of the Civil Law Act, following the authority of *Chandris v Isbrandsten – Moller Co Inc*.[12] The relevant portion of the headnote to this case reads:

> Held, that the power of an arbitrator to award interest was derived from the submission to him, which impliedly gave him power to decide "all matters in difference" according to the existing law of contract, exercising every right and discretionary remedy given to a court of law; …

We note that this decision has been applied by the Malaysian courts in *Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd*[13] and *Raja Lope & Tan Co v Malayan Flour Mills Bhd*.[14] The Court of Appeal in the recent case of *Leong Kum Whay v QBE Insurance (M) Sdn Bhd*[15] also confirmed not only that the arbitrator has a power to award pre award interest but also that he should in normal circumstances do so following established court practices. In that case the arbitrator had failed to order pre-award interest and the Court of Appeal amended the award to add interest at 8% from the date of the accident to the date of the award. We see no reason why these principles should not continue to apply under the new Act.

The English Act[16] goes further and provides for interest to be awarded on the whole or any part of an amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award in respect of any period up to the date of payment. A similar provision is found in s 12 of the New Zealand Act. This is a most useful provision which could usefully have been followed.

Section 41: Determination of preliminary point of law by court – the special case procedure

This provision is in Part III of the Act and hence only applies to domestic arbitrations, unless (in the case of international arbitrations) the parties opt in. It replaces s 22 of the old Act, which in turn was inherited from the English Act of 1950.

The procedure stems from a time when most arbitrators were laymen, and not considered in a position to handle points of law arising in the course of an arbitration. In the present day context, the arbitrators are very often retired judges or senior counsel with many years of experience in the law.

12 [1951] 1 KB 240.
13 [1994] 2 MLJ 51 at p 54.
14 [2000] 6 MLJ 228 at p 238.
15 [2006] 1 AMR 668 at p 687.
16 Section 49.

The problem with the old procedure is that one party to the arbitration could at any time ask the arbitrator to state a case for the decision of the court, and if the arbitrator refused, could apply to the High Court to direct the arbitrator to do so. It is generally considered that the old provision has been open to abuse because frequently an application was made by one party against the wishes of both the arbitrator and the other party. The party wishing to refer the matter could stop the arbitration in its tracks by threatening the arbitrator with misconduct if he refused to halt the proceedings while the application was pending in court. Also often so-called questions of law were tied up with the facts which had not yet been determined by the arbitrator, rendering the whole exercise premature. Lastly, such applications could lead to long delays, while the court's decision was awaited and then appealed against.

The new s 41 drastically curtails the availability of this procedure making it only available when either both parties consent or the arbitral tribunal consents. It is no longer available at the instance of one party without the support of either the other party or the arbitrator.

Also by way of a filter provision, it is incumbent on the applicant to satisfy the court that by entertaining the application, there will be a substantial saving of costs, and also that the point of law substantially affects the interests of one or both the parties.

Finally the section specifically authorises the arbitrator to proceed with the arbitration while the application is pending.

We predict that this procedure will be invoked much less often; nevertheless it does have a legitimate use particularly in cases where a lay arbitrator is faced with a point of law which can be isolated from the facts and is central to any decision.

Section 37: Applications for setting aside awards; Section 42: References on questions of law

These are the only two provisions in the new Act providing a machinery for setting aside arbitral awards.

Section 37 basically follows article 34 of the Model Law, and is in Part II. It therefore applies to all arbitrations held in Malaysia. It only provides a remedy on grounds of lack of jurisdiction and on public policy grounds. Section 39(2) introduces one innovation which is not in the Model Law but which follows a similar provision in the New Zealand Act. This states that:

(a) the making of an award induced by fraud or corruption; or

(b) a breach of natural justice occurring in the arbitral proceedings or in the making of an award

are declared to be in conflict with the public policy of Malaysia.

It can therefore be said that this section provides a remedy somewhat similar to s 24(2) of the old Act, under which an award can be set aside on the ground of the arbitrator's misconduct. However misconduct under s 24 has over the years come to denote procedural irregularity in the proceedings rather than moral turpitude. See Raja Azlan Shah J in *Syarikat Pemborong Pertanian & Perumahan v FLEDA*[17] also quoted by the Court of Appeal in *Future Heritage v Intelek Timur*.[18] We see the new provision as welcome because now the focus is taken away from technical irregularities and focussed on breaches of the rules of natural justice.

The other relevant section is s 42 which is not in the Model Law and is in Part III of the new Act; hence it applies only to domestic arbitrations and to international arbitrations only if the parties have opted in.

The alternate ground available under the existing law is "error of law on the face of the award"; this was described in the House of Lords case of *Bremer Vulcan*[19] as an anomalous common law jurisdiction, but it has been applied as such by the Malaysian courts: see for example KC Vohrah J in *Shanmugam Paramsothy v Thiagarajah*.[20] However it is an unsatisfactory and haphazard remedy because whether the remedy is available is entirely dependent on whether the error is apparent on the face of the award; arbitrators have been known in the past to avoid risk of being set aside by not giving a reasoned award or giving reasons in a separate document not part of the award. It is clear that this remedy will no longer be available under the new Act, by virtue of s 8, and the remedy is now replaced by s 42.

The issue of the extent to which domestic arbitral awards should be subject to appeal to the court on points of law has been the subject of argument in almost all common law jurisdictions. The conclusion reached by the committee set up to review the arbitration legislation in Singapore as explained in the clause by clause commentary on the proposed (domestic) Arbitration Bill 2001 can be summarised in the following comment:

> In relation to domestic arbitration, the sub-committee suggested that "the courts should be more closely involved … (both in order to protect weaker parties and for the purpose of being involved in the evolution of decisions that concern domestic law and practice)." We find much wisdom in this view and accept that an absolute abolition of the right of appeal may not be desirable in arbitrations under the domestic regime. Retaining a limited degree of review by the court is consistent with the parties' desire to have the matter decided in

17 [1971] 2 MLJ 24.
18 [2003] 1 AMR 185; [2003] 1 CLJ 103.
19 [1981] 1 All ER 289.
20 [2001] 4 AMR 4505; [2001] 8 CLJ 683.

> accordance with the law as properly understood and as applied in Singapore. The right of appeal against awards on questions of law is thus retained in this Bill.

The English 1979 Act for the first time introduced a qualified system for appeals on question of law, by providing that such appeals could only be brought by the consent of the other parties to the reference or with the leave of the court. In the well known case of *BTP Tioxide Ltd v Pioneer Shipping Ltd (the "Nema")*,[21] the question of how the court should exercise its discretion in granting leave was discussed, and led to the famous "Nema guidelines". Their Lordships accepted that a strict test should be applied and laid down a two point test. The test is rather similar to the two point test laid down by Edgar Joseph Jr FCJ in *Datuk Syed Kechik bin Syed Mohamed v Board of Trustees of the Sabah Foundation*[22] for the granting of leave to appeal to the Federal Court from decisions of the Court of Appeal. The first limb of the test is the test of "public interest", which would be satisfied as explained by Lord Diplock at p 248 "if the decision of the question of construction in the circumstances of the particular case would add significantly to the clarity and certainty of English commercial law." The second limb requires that, notwithstanding that the public interest element is amply satisfied, the judge must still be satisfied that a strong prima facie case has been made out.

These provisions have been re-enacted in statutory form in s 69 of the English 1996 Act and also in the Singapore Domestic Arbitration Act. In New Zealand, rather more detailed guidelines were laid down by a five man panel in the High Court case of *Gold & Resource Developments (New Zealand) Ltd*.[23] In the *Gold* case, the panel without finally deciding the points appeared to approve the statement in Mustill and Boyd,[24] that an allegation that a tribunal acted without evidence or upon a view of the facts which could not reasonably be entertained does not amount to a point of law for purposes of arbitral decisions.

This brings us back to s 42 of the new Act, and to note that the trend outlined above to limit the scope of appeals on a point of law has not been followed in Malaysia. There is no requirement to obtain leave, no provision to limit or define the question of law and no apparent discretion vested in the court to entertain or not to entertain the reference. This raises concern that the section may reverse the current trend and lead to opening of the floodgates with the consequential result of delaying implementation of arbitral awards.

We hope however that the courts will accept the statement in Mustill and Boyd and the views of the panel in *Gold* and not entertain as points of law submissions which turn on the evidence. This would only open the floodgates further.

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21 [1981] 2 Lloyd's Rep 239.
22 [1999] 1 AMR 833; [1999] 1 MLJ 257.
23 [2000] 3 NZLR 318.
24 *Commercial Arbitration*, 2nd edn, pp 592-3 and 596.

Finally we should point out that the parties in a domestic arbitration are, by virtue of s 3 free to opt out of this provision.

The disappearance of the special position of fraud allegations

Section 25(2) of the old Act, which provides for a party to an arbitration to apply to the High Court for an order to revoke the appointment of arbitrator when there are allegations in the arbitration that a party has been guilty of fraud, is not found in the new Act. The origin of this provision which followed the English 1950 Act was that professional men accused of fraud in an arbitration should have the right to trial by jury. The omission is welcome. There is no reason why arbitrators should not deal with issues of fraud, more particularly as they are often peripheral and connected with technical issues commonly found in construction arbitrations.

Conclusion

In conclusion we would like to congratulate the government on an excellent Act, which provides a workable framework and fulfils most of the requirements for a modern approach to arbitration. We hope that the few weaknesses indicated in this article can be looked into with a view to amendment to make the Act better still.