THE NEW MALAYSIAN ARBITRATION REGIME 2005

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Introduction

Malaysia enacted a new Arbitration Act 2005 (Act 646) on 30 December 2005 based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. 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 will be applicable to all arbitrations 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.

While the old 1952 Act had the merits of simplicity and clarity, it was long outmoded. With the increasing popularity of arbitrations in Malaysia, there was more and more judicial grist exposing the infirmities, shortcomings and lacunae found in the old Act. The Malaysian Arbitration Act 2005 is to be applauded as it makes the long awaited and much needed change clamoured for by the business and arbitral communities in Malaysia. Arbitration law, practice and procedure will now see a major overhaul and it would therefore be timely for practitioners in the arbitration field to take a close look at the 2005 Act.

The Arbitration Act 1952

The genesis of Malaysian statutory law on arbitration can be traced to the

Arbitration Ordinance XIII of 1809, of what was then the British India-controlled Straits Settlements, comprising of Penang, Malacca and Singapore. That Ordinance governed arbitration law and practice for nearly 150 years before it was replaced by the Arbitration Act 1952; the latter Act based almost word for word on the United Kingdom's Arbitration Act 1950. Both the 1952 Act and the UK Arbitration Act 1950 reflected an age when the courts were given wide berth to intervene and control the arbitral process. It also did not distinguish between domestic and international arbitrations, a divide which is nowadays a critical aspect of arbitration in the modern world.

The court exercised powers to revoke the arbitrator's authority or restrain arbitral proceedings on the ground that the arbitrator was not or might not be impartial; to order that the arbitration agreement cease to have effect where the dispute involved questions of fraud; to remove an arbitrator for delay in entering on the reference or making the award; to set aside, confirm or vary the award on appeal on a question of law; and to order the arbitrator to state a case on an issue of law arising from the arbitration proceedings.

There was a solitary amendment by a new s 34 in 1980 to the 1952 Act which created an odd divide based on the choice of regime dictated by the arbitration agreement. Section 34(1) states:

> Notwithstanding anything to the contrary in this Act or in any other written law but subject to subsection (2) in so far as it relates to the enforcement of an award, the provisions of this Act or other written law shall not apply to any arbitration held under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 or under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration.

The 1980 amendment totally excludes the operation of the 1952 Act and any written law for two categories of arbitrations named above (see *Klockner Industries-Anlagen CmbH v Kien Tat Sdn Bhd & Anor* [1990] 3 MLJ 183; *Soilchem Sdn Bhd v Standard-Elektrk Lorenz AG* [1993] 3 MLJ 68; *Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors* [1998] 2 MLJ 20; *Jati Erat Sdn Bhd v City Land Sdn Bhd* [2002] 1 CLJ 346). All other international arbitrations, whether conducted under other institutional rules such as HKIAC, SIAC, ICC, LCIA or ad hoc, remained subject to the full supervisory jurisdiction of the Malaysian courts under the 1952 Act. On the other hand, until recently there was even doubt if parties under the two specified categories of arbitrations can apply to court for relief such as interim preservation of property (see *Jati Erat Sdn Bhd v City Land Sdn Bhd* [2002] 1 CLJ 346; *Thye Hin Enterprises Sdn Bhd v DaimlerChrysler Malaysia Sdn Bhd* [2004] 5 AMR 562).

The Kuala Lumpur Regional Centre For Arbitration

The purpose of the 1980 amendment was clearly to try to encourage the use of the Kuala Lumpur Regional Centre for Arbitration (KLRCA) by other countries in the region which would not wish to become involved with the Malaysian courts (see PG Lim, *Practice and Procedure under the Rules of the Kuala Lumpur Regional Centre for Arbtiration* [1997] 2 MLJ lxxiii). It gave no

opportunity for any party to invoke the court's jurisdiction, causing delay and escalation of costs. Whatever doubts parties may have of the impartiality and competence of the Malaysian courts were rendered irrelevant.

In effect, the statutory exclusion of the 1952 Act was based on the choice of arbitration rules provided for in the arbitration agreement and did not require the parties to specifically agree on the exclusion. It was not only the 1952 Act which was not to apply but also 'other written law'. It meant in practice that the court's jurisdiction was totally ousted. In turn, there were nagging doubts of the ability of the Malaysian courts to play a supportive role in the arbitral process which is the norm in modern arbitral regimes. The court could not intervene nor could it assist. The arbitral tribunal did not always possess the powers of the court to ensure the arbitral proceedings are conducted properly and lead to a fair and just award.

As explained above, the odd divide introduced by the 1980 amendment did not follow the normal and logical divide between 'domestic' and 'international' but followed the choice of regime in the arbitration agreement. The decision in *Jati Erat Sdn Bhd v City Land Sdn Bhd* [2002] 1 CLJ 346 confirmed that the 1980 amendment applied to any arbitration held under the KLRCA Rules irrespective of whether the parties were local or international (as compared to the earlier curiously reasoned decision of *Syarikat Yean Tat (M) Sdn Bhd v Ahli Bina Pamong Sari Sdn Bhd* [1995] 5 MLJ 469 which seem to suggest otherwise).

Homayoon Arfazadeh has commented on the possible difficulty arising where domestic arbitrations have the option of acquiring such comprehensive immunity merely by the parties agreeing to arbitrate according to the KLRCA Rules. He opined that 'It is self-evident that there are no legal or policy justifications to waive Malaysian jurisdiction over purely domestic disputes … if s 34 is to include domestic arbitration, arbitrators are granted the power to ignore Malaysian laws, even in domestic disputes, every time the losing party has assets in a foreign country where the award could be enforced as a 'foreign arbitral award'. This assumption is equivalent to the inconceivable abrogation of Malaysian municipal laws over domestic disputes' (see Homayoon Arfazadeh, *New perspectives in South East Asia and delocalised arbitration in Kuala Lumpur*, Journal of International Arbitration, Vol 8, No 1, March 1991, p 103 at p 111).

In hindsight, the real misconception was that the 1980 amendment would encourage greater use of the KLRCA and not discourage others from using Malaysia as a seat of arbitration (see PG Lim, *Practice and Procedure under the Rules of the Kuala Lumpur Regional Centre for Arbtiration* [1997] 2 MLJ lxxiii). The reverse happened. While this misplaced myth was perpetuated, Malaysia continued to lag far behind its rivals Hong Kong and Singapore in attracting international arbitrations. The parties were not attracted to hold their arbitrations under the KLRCA rules and ICSID rules in order not to be subject to the laws of Malaysia or potential interference from the courts. Domestic arbitrations conducted under these rules were deprived of access to the courts.

The Making of the New Arbitration Act 2005

The Malaysian courts intervened extensively in those arbitrations not falling under KLRCA Rules or ICSID Rules. This led to uncertainty and considerable time wastage. The situation was out of line with the modern approach favouring party autonomy and minimal court intervention especially in international arbitration. There were calls for a total revamp of the archaic arbitral regime.

The world of arbitration is fast changing. By the late 1990s, it had become common for countries to base their arbitral reforms on UNCITRAL Model Law. The UN General Assembly Resolution of 11 December 1985 adopted the UNCITRAL Model Law which recorded that '[the] model law… significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations'. The Member States were free to adapt or modify the Model Law to suit local conditions and considerations.

The enactment of the new Malaysian Act 2005 is the culmination of a long period of gestation. There have been heated debates about the form the new Act should take. Various points of view have been hotly canvassed. The protectionist lobby as represented by the Malaysian Institute of Arbitrators fought for registration and licensing of arbitrators and for a separate domestic Act modelled on the English 1996 Act. Representations were also made for the retention of the special position given to KLRCA arbitrations. The Malaysian Bar Council on the other hand wanted a single Act based on the UNCITRAL Model law, arguing that a dual regime based on English 1996 Act for domestic and UNCITRAL Model Law for International arbitrations was illogical, confusing and against the spirit of harmonization.

The debate is now settled. The new 2005 Act adopts most of the broad principles outlined in the Model Law to fit in with some of the more beneficial aspects of the existing common law system of Malaysia, as well as to enhance the use of arbitration in Malaysia. During the drafting of the new Act, these questions arose: firstly, should there be any distinction at all between international arbitrations and domestic arbitrations, bearing in mind that no such distinction existed under the old Act and if so, what distinctions should be made; secondly, should there be a separate domestic arbitration Act as in neighbouring Singapore, and if so, on what should it be modelled?

On the first question, the new Act recognises that some distinctions between these domestic and international regimes are required in the local circumstances, but only for limited purposes, using the Model Law definition for international arbitrations as the yardstick for the distinction. It would seem that the basic reasoning behind this is that, on the international side, parties would not want any more local court intervention than is prescribed and allowed under the Model Law; while on the domestic side there is still a need for the courts' supervisory jurisdiction in the matter of appeals on points of law, bearing in mind that the majority of domestic arbitrations are conducted before lay arbitrators under standard form construction contracts. The primary difference between the two regimes is the extent of judicial supervision, which is significantly greater under the domestic arbitration regime.

On the second question, the new Act further recognises that there was no reason why the Model Law should not be used as the basis for domestic arbitrations. This was certainly the view taken by the UN Secretariat which in its explanatory note to the introduction to the Model Law stated its opinion that: 'the Model Law constitutes a sound and promising basis for the desired harmonization and improvement of national laws.'

It had been noted that many countries have adopted the Model Law as the basis for their domestic regime, and the oft repeated mantra that the Model Law is somehow unsuitable for use in common law countries is quite unjustified. On the other hand, the Model Law also had the benefit of focusing on party autonomy which is a key component of any effective system of international arbitration, which needs to be free of unfamiliar local standards (see H. Holtzmann and J Neuhaus, *A Guide to the UNCITRAL Model Law in International Commercial Arbitration*, Kluwer, 1994, p 11). The question of whether there should be one Act or two (as in Singapore) is mainly a question of form rather than substance. The new Act adopts the harmonising approach of having a single Act with two regimes. Both regimes within the new Act are based on the Model Law with the few necessary distinctions.

The new Act has been most influenced by the New Zealand Act 1996 which has specified amongst its purposes:

> (b) To promote international consistency of arbitral regimes based on the Model Law…; and
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> (c) To promote consistency between the international and domestic arbitral regimes in New Zealand.…

Overview of the New 2005 Act

The new Arbitration Act is divided into four parts: I Preliminary, II Arbitration, III Additional provisions relating to arbitration, 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. It provides for the application of the 2005 Act to arbitrations (both domestic and international) where the seat of the arbitration is in Malaysia. The key provision is s 3, which 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'. In other words, in respect of domestic arbitrations, the 2005 Act allows parties to opt out of the provisions of Part III (the 'opt out' provision). Parties to international arbitrations are conversely allowed to opt for the application of Part III (the 'opt in' provision).

Section 3 effectively abolishes the 1980 amendment to the 1952 Act, and there is no longer any distinction made on the basis of the arbitral rules provided for in the arbitration agreement.

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

subject headings of ss 3 to 36 of the Model Law. The variations can be easily identified. Part II provides flexibility in the procedure for appointing arbitrators, to challenge the appointment of an arbitrator, the determination of rules of procedure to be adopted in arbitral proceedings, the competence of the arbitral tribunal to rule on its jurisdiction and general provisions on the conduct of the arbitration, including the grant, setting aside and enforcement of arbitral awards. Part II includes a mandatory stay of court proceedings in respect of a matter which is the subject of an arbitration agreement. Part II further provides the court with power to grant interim measures in the form of, inter alia, preservation, interim custody or sale orders, interim injunctions, the giving of evidence by affidavit, discovery and interrogatories and security for costs in all arbitrations. It also limits recourse against an arbitral award to the narrowly defined circumstances envisaged in the Model Law.

Part III of the 2005 Act provides for the court to exercise some control over arbitration proceedings. It contains seven sections which are not found in the Model Law and, as explained above, only apply to domestic arbitrations subject to the opting out and opting in principle. They deal with additional powers given to the courts to supervise and support arbitration proceedings, and other matters not dealt with in the Model Law. The key provision is the section which deals with appeals on points of law. Part III follows the grounds set out in the Model Law for resisting the enforcement of an award. The grounds are drafted to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It must be noted that the court's powers of intervention in Part III are far wider that those provided for in Part II of the 2005 Act. They are intended to cater specifically for domestic arbitrations where court intervention is deemed to be a necessary check and balance.

Part IV contains five sections which deal with miscellaneous provisions such as liability of arbitrators, immunity of arbitral institutions, bankruptcy, mode of application, repeal and savings. There is enforceability of arbitration agreements by the trustee, that is, the person having jurisdiction to administer the property of a bankrupt.

Salient Provisions and Changes of Substance from the Model Law

For the most part the new Act follows closely the Model Law. There are however some salient provisions and changes from the Model Law including the following:

Model Law Article 1(2): Applicability to Foreign Arbitrations

One unfortunate omission in the new Act is a provision along the lines of art 1(2) of the Model Law which clarifies which sections are applicable to arbitrations held outside Malaysia. Under the Model Law, only four provisions are stated to apply to arbitrations held outside Malaysia:

Section 8 — Arbitration agreement and substantive claim before the court;

Section 9 — Arbitration agreement and interim measures by High Court;

Section 35 — Recognition and enforcement; and

Section 36 — Grounds for refusing recognition enforcement.

The absence of such a provision in the new Act has left some uncertainty. We do not see a problem with the equivalents of arts 35 and 36, 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 with regard to the equivalents of arts 8 and 9 is not so clear.

It may be argued that, in the absence of an equivalent provision to art 1(2) of the Model Law, the new Act contemplates its application only to arbitrations where the seat of arbitration is in Malaysia, and therefore that the stay provision 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 non-compliance by Malaysia with article II.3 of the New York Convention, which requires a mandatory stay to be provided where the arbitration is to be held in a Convention country.

However it can also be persuasively argued that the Malaysian equivalent section should be construed widely so as to include the obligation to grant a stay of court proceedings in aid of a foreign arbitration and so as to comply with Malaysia's treaty obligations under the New York Convention. This ambiguity has been brought to the attention of the Malaysian Government and it is highly likely that consideration will be given to amending the new Act to clarify the position.

Turning to the equivalent of article 9, it is noted that the Indian Supreme Court in *Bhatia International v Bulk Trading* ALR 2002 SC 1432–202(4) SCC 105, in the face of a similar ambiguity in the Indian Act, ruled that, even where the parties had chosen a country other than India as the place of arbitration, the provision for granting interim measures of relief in the Indian Act would still apply. This decision would be of high persuasive authority in Malaysia.

Model Law Article 1(3): 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 new 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':

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 is 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.

The new Act 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 1994. In s 5, the Model Law definition of international arbitration, the first limb (a) 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 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 (a) of the new Act, this illogicality is avoided and the arbitration will be classed as international.

Model Law Article 5: Party Autonomy and Reduction of Judicial Intervention

The underlying theme of the Model Law is party autonomy. One basis of achieving this is the reduction of judicial intervention. Section 8 of the new Act does this by stating that: 'unless otherwise provided, no court shall intervene in any of the matters governed by this Act'. This is a restatement of art 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. However, the court's power to remedy abuses such as fraud, corruption and non-observance of the rules of natural justice and enforcement of arbitral awards is preserved by s 37.

Model Law Article 8: The Stay Provisions

This article of the Model Law makes it mandatory for a court to refer to arbitration disputes brought before the Court where the dispute is the subject of an arbitration agreement and where the party seeking the reference to arbitration applies to the Court before submitting any defence on the substance of the dispute, unless the Court holds that the arbitration agreement is null and void, inoperative or incapable of being performed.

Section 10 of the new Act follows the Model Law except that it has added as an additional ground for refusing the stay 'that there is not in fact any dispute between the parties with regard to the matters agreed 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 New Zealand in *Todd Energy v*

Kiwi Power C.P. 46/10, 29.10.01, 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. However, this situation may be avoided if the distinction is made between the contention that no dispute exists and the contention that, although a dispute exists, the answer is clear and the contention of one side not worthy of any merit.

The new Act by subsection (2) states that 'the court in granting a stay of proceedings pursuant to subsection (1) may impose any conditions as it deems fit.' This right to impose conditions reflects a departure from art 8 of the Model Law. The power to impose conditions can be a useful addition provided it is used in support of the arbitration, for example to ensure that the party seeking the stay takes appropriate steps to proceed with the arbitration and doesn't simply use the stay to block the litigation. However a qualified provision would have prevented it being used for purposes which defeat the mandatory nature of the stay, ie by imposing an onerous condition to provide security for costs. The provision appears to be unfettered and it is uncertain how the Malaysian courts will construe such a provision or if they will use it to wield control over the arbitration proceedings.

Subsection (3) of s 10 of the new Act has gone some way to alleviate the problem of delay faced by parties under the 1952 Act whilst the Malaysian courts are considering the question of stay. It provides for the commencement or continuation of arbitral proceedings whilst the question of stay is pending in court.

Model Law Articles 9 and 17: Interim Measures of Protection

This subject is now covered by s 11 of the new Act, which corresponds with art 9 of the Model Law and deals with the powers of the High Court, and s 19 which corresponds with art 17 and deals with the powers of the arbitral tribunal. In both cases the new Act has expanded the Model Law provisions by providing for specific powers. In contrast to the Singapore International Arbitration Act 1994 s 12, 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 tribunal under s 19, and wider powers to the High Court. In particular power to prevent the dissipation of assets is left with the High Court.

The provision in the new Act is more appropriate, especially since the tribunal has no power to enforce its award on persons who are not parties to the arbitration. However, the new Act is silent on the question of whether the tribunal can award interim measures on a true *ex parte* application, ie without notice having been given to the other side. Having regard to the overriding provision of s 20 (art 18 of the Model Law), which requires each party to be treated with equality and given a fair and reasonable opportunity of presenting its case, the better view is that the 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 a situation.

With the overlap of power between the High Court and the tribunal, there always exists the possibility of conflict where one party chooses to go to the High Court and the other to the tribunal. There is also the possibility that one party may try to stifle the arbitration by reference to the court or that 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 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334:

> 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… 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 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.

Model Law Article 11: Appointment of Arbitrators

As already mentioned, under the new Act, the special position given to arbitrations held under the KLRCA rules under the 1980 amendment to the old 1952 Act is abolished. This is long overdue. However, the Director of the Regional Centre for Arbitration Kuala Lumpur now 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. This is consistent with art 6 of the Model Law which leaves it to individual countries to decide which court or other authority is competent to carry out the various functions which the Model Law leaves with the 'court or other authority'.

In appointing the Director of Regional Centre for Arbitration Kuala Lumpur to perform this function, the new Act 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 an appointment. The Director is also by s 13(8) required to consider qualification, independence and nationality before making any appointment; while he is not

expressly required to seek the views of the parties, this obligation can be implied from s 13(8).

However, the preferable method is for the parties to reach agreement on the person or persons to be appointed as arbitrator. It recognises the parties' freedom to choose the arbitrator and capitalises on one of the greatest advantages of choosing arbitration as the method of dispute resolution. Parties are advised to consider carefully their choice of appointing authority and avoid those that have developed a reputation for appointing incompetent or inappropriate arbitrators. It may be too late to reconsider the appointment of the arbitrator once it is made and accepted.

Model Law Article 16: Competence of Arbitral Tribunal to rule on its own jurisdiction

The new Act in s 18 empowers the arbitral tribunal to rule on its own jurisdiction following the doctrine of 'Kompetenz-Kompetenz'. It also deals with the doctrine of separability and any ruling by the arbitral tribunal is subject to the right of appeal to the High Court. Separability of the arbitration clause seeks to preserve the arbitral process. The arbitration clause is considered as a separate agreement, detached from the main contract, and therefore is treated as an agreement independent of the rest of the contract (see Peter Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdiction*, 2000, paragraph 4.009, p. 110). It provides for the legal basis for the appointment of the arbitral tribunal. If the tribunal is to decide its own jurisdiction, it must first assume jurisdiction. It then allows the question of total jurisdiction challenge to be decided by the tribunal in accordance with the provisions of the new Act (see Redfern, Hunter, Blackaby and Partasides, *Law and Practice of International Commercial Arbitration* (4th Ed) Sweet & Maxwell, p 299).

Model Law Article 34: Application for Setting Aside Award

Recourse against an arbitral award is now limited to the narrowly defined circumstances as set out in the Model Law. The courts will not be able to interfere with arbitral awards as seen in the case of *Government of India v Cairn Energy India Pty Ltd* [2003] 1 MLJ 348 where an arbitral award was set aside on the basis that the arbitral tribunal had failed to analyse and appraise material evidence.

The main addition to the Model Law is a provision which seeks to expand art 34(2)(b)(ii), by allowing the court to set aside an award in conflict with the public policy of the State.

The Malaysian addition states:

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where —

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

(b) a breach of the rules of natural justice occurred:

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

This expansion of the public policy concept is debatable and only time will tell. Certainly it is the prerogative of each country to spell out what it considers to be contrary to public policy and better that this should be known. The first limb of the addition which refers to awards 'induced or affected by fraud or corruption' is unexceptional, since it must surely be part of the public policy of every civilised country. However the second limb, which deals with 'breaches of the rules of natural justice' may be more debatable: the concern is that the floodgates may be opened by expanding the limited grounds for setting aside available under the Model Law to cases where a detailed scrutiny of the procedure adopted in the arbitration becomes necessary.

Model Law Articles 35 and 36: Recognition and Enforcement of Awards

The Model Law approach embodied in arts 35 and 36, is explained in the explanatory note of the UNICITRAL Secretariat on the Model Law which is attached to the text:

> 45. The eighth and last chapter of the Model Law [articles 35 and 36] deals with recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad and that these rules should follow closely the 1958 New York Convention. …
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> 47. By modelling the recognition and enforcement provisions of the 1958 New York Convention, the Model Law supplements, without conflicting with the regime of recognition and enforcement created by that successful convention.

The new Act has followed in part the policy of the Model Law in synchronising the procedures and requirements for recognition and enforcement of local awards and awards made in foreign states: however in the latter case it has retained the concept of reciprocity by limiting the recognition and enforcement of foreign awards to awards made in a country which has acceded to the New York Convention.

Interestingly the Malaysian expansion of the public policy ground which is found in the section corresponding to Model Law article 34 has not been repeated in the section corresponding with article 36. It is reasonable to assume however that the same expansion of the definition of public policy would be applied to the latter since it would be illogical to apply a different test for public policy in the matter of enforcement of awards to the test applied for setting aside awards.

Arbitral Immunity

The Model Law does not address arbitral immunity. The common law recognises a certain degree of immunity from suit for arbitrators because of their judicial capacity (see *Sutcliff v Thackrah* [1974] AC 727 at pp 757–758; *Arenson v Casson Rutley & Co* [1977] AC 405 at pp 432–434). The new Act s 47 assures arbitrators that they will not be exposed to liability should they commit any

mistakes in the course of an arbitration; s 48 extends the immunity to arbitral institutions in the discharge of their functions.

Conclusion

The new Act is looked upon as a welcome change to the law and practice of arbitration in Malaysia. It has taken a bold internationalist approach to arbitration and Malaysia is now squarely in the Model Law community. There are some drafting imperfections but these can be resolved with some suitable amendments within the appropriate time.