



**LAW, PRACTICE AND PROCEDURE OF ARBITRATION —  
THE ARBITRATION ACT 2005 PERSPECTIVE<sup>1</sup>**

by

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**INTRODUCTION**

The statutory law on arbitration in Malaysia can be traced to the Arbitration Ordinance XIII of 1809, which governed what were then the British India-controlled Straits Settlements, comprising of Penang, Malacca and Singapore. It was in force for nearly 150 years before the Arbitration Act 1952 (Act 93) replaced it.

**THE ARBITRATION ACT 1952 (ACT 93)**

The Arbitration Act 1952 was *pari materia* to the United Kingdom's Arbitration Act 1950. It served its purpose as a simple and clear statute to regulate the practice of arbitration. By the turn of the century, it was definitely outmoded and unsuitable for the effective resolution of modern commercial disputes.

In particular, under the Arbitration Act 1952 the courts were given wide berth to intervene and control the arbitral process. The 1952 Act also did not distinguish between domestic and international arbitrations, a divide which is a critical aspect of arbitration in the modern world.

The court exercised powers to revoke the arbitrator's authority or to restrain arbitral proceedings on the grounds that the arbitrator was

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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.

### THE NEW YORK CONVENTION (Act 320)

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (Act 320) enacted the New York Convention dealing with the recognition and enforcement of international awards.

### THE 1980 AMENDMENT — SECTION 34

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 of s 34 totally excludes the operation of the 1952 Act and any written law for two categories of arbitrations namely, those held under the KLRCA Rules and ICSID (see *Klockner Industries-Anlagen GmbH v Kien Tat Sdn Bhd & Anor* [1990] 3 MLJ 183; *Soilchem Sdn Bhd v Standard-Elektrik 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 ad hoc or conducted under other institutional rules such as the Hong Kong International Arbitration Centre (HKIAC), Singapore International Arbitration Centre (SIAC), International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) remained subject to the full supervisory jurisdiction of the Malaysian courts under the 1952 Act.

Until 2004, there was even doubt as to whether 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* [2005] 1 MLJ 293; [2004] 5 AMR 562).

### 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 Arbitration* [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 laws'. It meant in practice that the court's jurisdiction was totally ousted.

However, 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 Abli Bina Pamong Sari Sdn Bhd* [1996] 5 MLJ 469 which seem to suggest otherwise).

The 1980 amendment did not encourage greater use of the KLRCA or Malaysia as a seat of arbitration. 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. Malaysia was left behind Hong Kong and Singapore in attracting international arbitrations.

Also, domestic arbitrations conducted under KLRCA Rules were similarly deprived of access to the courts. The net effect was such domestic arbitrations were hamstrung. The better informed parties avoided arbitrating under the KLRCA Rules. The result was that the number of arbitrations using KLRCA Rules remained low as compared to those being held under the Arbitration Act 1952.

### THE ARBITRATION ACT 2005 (ACT 646)

The Arbitration Act 2005 (Act 646) was enacted on 30 December 2005 to bring about wholesale reform of the arbitral regime. It was based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.

The Arbitration Act 2005 repealed and replaced the Arbitration Act 1952 (Act 93) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (Act 320) which enacts the New York Convention dealing with the recognition and enforcement of international awards.

### APPLICABLE TO ALL ARBITRATION AFTER 15 MARCH 2006

When deciding the question as to whether the old 1952 Act or the new 2005 Act applies, s 51 provides:

51 Repeal and savings:

- (1) The Arbitration Act 1952 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1958 are repealed.
- (2) Where the arbitral proceedings were commenced before the coming into operation of this Act, the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this Act had not been enacted.
- (3) Nothing in this Act shall affect any proceedings relating to arbitration which have been commenced in any court before coming into operation of this Act.

In other words, s 51 of the Arbitration Act 2005 states that it is 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. The exception being the enforcement of an arbitral award made pursuant to an arbitral proceedings commenced under the old 1952 Act but published after the new 2005 Act had come into effect.

The case of *Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd* [2008] 7 MLJ 757 has raised doubts on which Act is to apply in the

case of an arbitration agreement entered into during the term of the old 1952 Act. This issue was considered by the court in *Hiap-Taih Welding & Construction Sdn Bhd v Boustead Pelita Tinjar Sdn Bhd* (formerly known as *Loagan Benut Plantations Sdn Bhd*) [2008] 8 MLJ 471.

In this case the contractor served a statutory notice pursuant to s 218 of the Companies Act 1965 on 23 July 2007 for an alleged debt on the employer. The employer's interim injunction to restrain presentation of the petition was granted. The contractor counterclaimed for the alleged debt. The employer applied for stay pending arbitration claiming that this was a mandatory stay under the Arbitration Act 2005.

The arbitration agreement between the parties provided, *inter alia*, as follows:

63 ARBITRATION

- 63.1 (a) if any dispute or difference shall arise between the Employer and the Contractor, either during the performance or after completion of the Works, or after termination of the Contractor's employment, or breach of this Contract, as to —
- (i) the contraction of this Contract; or
  - (ii) any matter or thing of whatsoever nature arising under arising under this Contract; or
  - (iii) the withholding by the ER of any certificate to which the Contractor may claim to be entitled; then such dispute or difference shall be referred to the ER for a decision.
- (b) The ER decision which is to be in writing shall subject to sub-clause (e) hereof be binding on the parties until the completion of the Work and shall forthwith be given effect to by the Contractor who shall proceed with the Works with all due diligence whether or not notice of dissatisfaction is given by him. (c) If the ER fails to give a decision for a period of forty-five (45) days after being requested to do so by the Contractor or if the Contractor be dissatisfied with any decision of the ER, then in any such case the Contractor may within forty-five (45) days after the expiration of forty-five (45) days after receiving the decision of the ER, as the case may be, require that such dispute or difference be referred to arbitration and final decision of a person be agreed between the parties to act as the Arbitrator. The arbitration shall be held at the Regional Centre for Arbitration at Kuala Lumpur, using the facilities and assistance available at the Centre ...

- 63.4 The Contractor hereby irrevocably submits to the exclusive jurisdiction of the courts of Malaysia in respect of the

construction and the interpretation of the Contract Documents and the non exclusive jurisdiction of the courts of Malaysia for the enforcement of the arbitral awards judgments or matters of like nature.

63.5 In this Conditions, 'reference' *shall be deemed* to be reference to arbitration within the meaning of the Arbitration Act 1952 (Revised – 1972). (Emphasis added.)

The High Court denied the stay and stated that the Arbitration Act 1952 would apply. After looking at the construction of the arbitration agreement and the respective provisions of the old 1952 Act and the new 2005 Act the court offered two reasons in support of its decision.

The first reason was that the arbitration clause referred to the Arbitration Act 1952 and that any reference to arbitration deemed to be a reference within the meaning of the 1952 Act. The court paid particular attention to the phrase *shall be deemed* in cl 63.5 of the arbitration agreement and held that the phrase kept the continued application of the old 1952 Act by way of a vested right or privilege which would have otherwise be excluded by its repeal by the new 2005 Act.

The second reason was based on the fact that the Bahasa Malaysia version is different from the English version. The Bahasa Malaysia version of s 51(2) of the Arbitration Act 2005 reads:

*Jika perjanjian timbang tara dibuat* atau prosiding timbang tara dimulakan sebelum permulaan kuat kuasa Akta ini, undang-undang yang mengawal perjanjian timbang tara dan prosiding timbang tara itu adalah undang-undang yang sepatutnya terpakai seolah-olah Akta ini tidak diperbuat.

(Emphasis added.)

Therefore, the Bahasa Malaysia version provides that the 2005 Act does not apply *where an agreement was made* or the proceedings were commenced before the coming into operation of the Arbitration Act 2005. The court concluded that the aforesaid manifest the intention of Parliament to exclude the applicability of the 2005 Act where the arbitration agreement was made before the coming into operation of the 2005 Act.

This was despite the fact that Parliament had deemed the English text as being authoritative and the Bahasa Malaysia version is rendered as a translation.

The relevant *gazette* reads as follows:

PU(B) 61

AKTA BAHASA KEBANGSAAN 1963/67



PENETAPAN DI BAWAH SEKSYEN 6

Pada menjalankan kuasa yang diberikan kepada Yang di-Pertuan Agong oleh seksyen 6 Akta Bahasa Kebangsaan 1963/67 [Akta 32], dan yang diwakilkan kepada Perdana Menteri di bawah P.U. 33/68. Perdana Menteri menetapkan bahawa *naskbah sah bagi Akta Timbang Tara 2005 [Akta 646] dan mana-mana perundangan subsidiari yang dibuat di bawahnya ialah naskbah dalam bahasa Inggeris.*

Bertarikh 21 Februari 2006

[PPM(S) 1039.00.00; PN(PU) 158/II]

Dato' Seri Abdullah bin Haji Ahmad Badawi

Perdana Menteri

NATIONAL LANGUAGE ACTS 1963/67

PRESCRIPTION UNDER SECTION 6

In exercise of the powers conferred on the Yang di-Pertuan Agong by section 6 of the National Language Acts 1963/67 [Act 32], and delegated to the Prime Minister under P.U. 33/68, the Prime Minister prescribes *that the authoritative text of the Arbitration Act 2005 [Act 646] and any subsidiary legislation made under it is the text in the English Language.*

Dated 21 February 2006

[PPM(S) 1039.00.00; PN(PU) 158/II]

Dato' Seri Abdullah bin Haji Ahmad Badawi

Prime Minister

AKTA BAHASA KEBANGSAAN 1963/67

PENETAPAN DI BAWAH SEKSYEN 6

Pada menjalankan kuasa yang diberikan kepada Yang di-Pertuan Agong oleh seksyen 6 Akta Bahasa Kebangsaan 1963/67 [Akta 32], dan yang diwakilkan kepada Perdana Menteri di bawah P.U. 33/68. Perdana Menteri menetapkan bahawa naskhah sah bagi Rang Undang-Undang Timbang Tara 2005 [Akta 646] yang dikemukakan dalam Mesyuarat Ketiga, Penggal Kedua, Parlimen Kesebelas ialah naskhah dalam bahasa Inggeris.

Bertarikh 21 Februari 2006

[PPM(S) 1039.00.00; PN(PU) 158/II]

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Dated 21 February 2006

[PPM(S) 1039.00.00; PN(PU) 158/II]

Dato' Seri Abdullah bin Haji Ahmad Badawi

Prime Minister

Based on the above, the Bahasa Malaysia version of the Bill and subsequently the Act are translations. The words '*Jika perjanjian timbang tara dibuat ...*' in the Bahasa Malaysia versions of both the Bill and the Act are an obvious error as they deviate from the English text. In such a circumstance, the English text should prevail over the Bahasa Malaysia version in accordance to the *Gazette* PU(B) 61. In the circumstances and with utmost respect, it is submitted that the ratio enunciated in *Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd* cannot stand.

At present, the case of *Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd* does cause considerable difficulties. If the stance is that the old 1952 Act should apply to all cases where the arbitration agreement was made before the commencement of the Act, then it would necessarily mean that the Arbitration Act 2005 will not be the ruling regime for arbitration for many years to come as most of the pre-existing arbitration agreements are entered into well before 15 March 2006.

It does put a damper on the enthusiasm which greeted the introduction of the 2005 Act. It was never the intention of Parliament that that should be the case. It is hoped that the courts will revisit this issue and rectify the situation. Also, the difference in the Bahasa Malaysia translation should be corrected by way of an amendment to the Act. For practical reasons, parties are encouraged to confirm that the Arbitration Act 2005 apply at the commencement of new arbitration proceedings.

### STRUCTURE OF THE ARBITRATION ACT 2005

The Arbitration Act 2005 is divided into four parts and various chapters:



I	Preliminary	ss 1 to 5
II	Arbitration	
	Chapter 1	General Provisions ss 6 to 8
	Chapter 2	Arbitration Agreement ss 9 to 11
	Chapter 3	Composition of arbitrators ss 12 to 17
	Chapter 4	Jurisdiction of arbitral tribunal ss 18 to 19
	Chapter 5	Conduct of arbitral proceedings ss 20 to 29
	Chapter 6	Making of award and termination of proceedings ss 30 to 36
	Chapter 7	Recourse against award s 37
	Chapter 8	Recognition and enforcement of awards ss 38 and 39
	Chapter 7	Recourse against award s 37
	Chapter 8	Recognition and enforcement of awards ss 38 and 39
III	Additional provisions relating to arbitration	ss 40 to 46
IV	Miscellaneous	ss 47 to 51

**PART I — PRELIMINARY**

Part I contains five sections which are as follows:

*Section 1 — Commencement*

The commencement date is 15 March 2006 (see *Gazette* Notification PU(B) 65/2006).

*Section 2 — Interpretation*

The Act defines award, High Court, Minister, State, presiding arbitrator, arbitration agreement, party, seat of arbitration, international arbitration, domestic arbitration and arbitral tribunal.

*Section 3 — Application to arbitration and awards in Malaysia*

This key provision 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.

*Section 4 — Arbitrability of subject matter*

This section provides for a wide and inclusive scope for the recognition of arbitration agreements.

*Section 5 — Government to be bound*

The Act applies to arbitration agreements where the Government is a party.

**PART II — ARBITRATION**

Part II is the core of the Act. It is arranged into 8 chapters. 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 UNCITRAL Model Law. The variations can be easily identified.

**Chapter 1 — General Provision***Section 6 — Receipt of written communication*

This section deals with service of an arbitration notice. It determines the date when arbitration proceedings are deemed to have commenced and is important for compliance of various time limits provided under the Act.

Given the phrase ‘unless otherwise agreed by the parties’, the provisions of this section will give way in the event of conflict with the provisions of the arbitration agreement or any institutional rules which the parties have agreed to incorporate.

*Section 7 — Waiver of right to object*

This section requires that objections based on non-compliance with the Act and the arbitration agreement are taken at the appropriate time and not delayed for tactical purposes.

*Section 8 — Extent of court intervention*

This section sets out the theme of the 2005 Act when it states:

Unless otherwise provided, no court shall intervene in any of the matters governed by this Act.

This differs from article 5 of the Model Law which provides,

In matters governed by this law, no court shall intervene except so provided in this Law.

Therefore the courts cannot intervene unless specifically provided for in the 2005 Act.

The court in *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor* [2008] 3 MLJ 872 held that the court’s power to intervene under s 8 of the Act is limited to what is expressed in the said provision, which is, unless the Act provides otherwise the court cannot intervene. In this case, the court held that there was no ground to intervene.

The Arbitration Act 2005 unfortunately does not have any provision along the lines of article 1(2) of the Model Law which clarifies which sections are applicable to arbitrations held outside Malaysia.

If there was a provision similar to article 1(2) of the Model Law, then 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 2005 Act has left some uncertainty in particular as regards to the mandatory stay provision and agreement and interim measures by the High Court.

The case of *Aras Jalinan Sdn Bhd v Tipco Asphalt Public Co Ltd & 2 Ors* [2008] 4 AMR 533 has highlighted the difficulties as the court denied relief for foreign arbitrations which had being upheld by the Court of Appeal.

## Chapter 2 — Arbitration Agreement

### *Section 9 — Definition and form of arbitration agreement*

This section defines the extent of agreements which are subject to the Act.

The court in *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor* [2008] 1 MLJ 233 explained the ambit of the section in the following words:

Under s 9 of the 2005 Act, the term ‘arbitration agreement’ has assumed a much more wider meaning to include an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not. And, though ‘an arbitration agreement shall be in writing’, there need not be a separate arbitration agreement per se, as it may be in the form of an arbitration clause in any written agreement or even in the form of an exchange of letters, telex, facsimile or any other means of communication or written record which evinces the fact that such an agreement existed between the parties.

### *Section 10 — Arbitration agreement and substantive claim before court*

Unlike the Arbitration Act 1952, this section provides for a mandatory stay of court proceedings where there is an arbitration agreement unless the arbitration agreement is null and void, inoperative or incapable of being performed; or there is in fact no dispute between the parties with regard to the matters to be referred.

The courts have allowed a mandatory stay for arbitrations held in Malaysia as seen in the cases of *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor* [2008] 1 MLJ 233; *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor* [2008] 3 MLJ 872; *CMS Energy Sdn Bhd v Poscon Corporation* [2008] 6 MLJ 561; *Borneo Samudera Sdn Bhd v Siti Rahfizah Mihalidin & Ors* [2008] 6 MLJ 817; [2008] 5 CLJ 435; *Majlis Ugama Islam dan Adat Resam Melayu Pahang v Far East Holdings Bhd & Anor* [2007] 10 CLJ 318;

It is not the same for foreign arbitrations. As pointed out in the discussion under s 8 above, it is argued that, in the absence of an equivalent provision to article 1(2) of the Model Law, the Arbitration Act 2005 contemplates its application only to arbitrations where the seat of arbitration is in Malaysia. Therefore the stay provision under s 10 will only provide for a stay of court proceedings where the arbitration is to be held in Malaysia.

The courts have taken different approaches in dealing with an application under s 10 where the seat of arbitration is not in Malaysia.

The parties in *Innotec Asia Pacific Sdn Bhd v Innotec GmBh* [2007] 8 AMR 67 were a Malaysian company and a German company. They entered into a partnership contract and resellers agreement which contained a clause making reference to arbitration in Germany. The Malaysian company was intended to be a JV company in which the German company was to be a shareholder.

The German company commenced arbitration in Germany when disputes arose between the parties. The Malaysian company sought an injunction to restrain the German company from proceeding with arbitration. On the other hand, the German company applied for a stay of the proceedings.

The Malaysian company argued that the stay was misconceived as the Arbitration Act 2005 does not apply to foreign arbitrations. The court dismissed the injunction application of the Malaysian company and allowed the stay application by the German company. The court held that it was incorrect to suggest that the Arbitration Act 2005 only applied to arbitration where the seat is in Malaysia.

The decision in *Innotec Asia Pacific Sdn Bhd v Innotec GmBh* echoes the decision of the Indian Supreme Court in *Bhatia International v Bulk Trading* ALR 2002 SC 1432-202(4) SCC 105. The Indian Supreme Court 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.

However, the court in *Aras Jalinan Sdn Bhd v Tipco Asphalt Public Company Ltd & 2 Ors* [2008] 4 AMR 533 took a different approach and refused relief for foreign arbitrations.

This case involved a Malaysian company, Aras Jalinan Sdn Bhd and two Thai companies, Tipco Asphalt Public Company Ltd and Thai Bitumen Company Ltd who were shareholders of Kenaman Oil Corporation Sdn Bhd.

Thai Bitumen Company Ltd granted a loan to Aras Jalinan Sdn Bhd to finance acquisition of shares in Kenaman Oil Corporation Sdn Bhd.

Tipco Asphalt Public Company Ltd started winding up proceedings against Kenaman Oil Corporation Sdn Bhd for alleged debt owned pursuant to the agreement to supply oil.

Parties entered into a settlement agreement dealing with repayment of debt and contract and management of Kenaman Oil which provided that any dispute arising out of the agreement is to be referred to arbitration in Singapore under the Rules of the International Chamber of Commerce.

The two Thai companies alleged breach of the settlement agreement and commenced steps to take control of Kenaman Oil. They then issued a notice to convene an extraordinary general meeting (EGM) of Kenaman Oil to appoint additional directors. On the other hand, Aras Jalinan Sdn Bhd alleged that the conduct of the Thais was contrary to the settlement agreement and filed an application before the High Court to restrain the holding of the EGM.

The court held that it had no jurisdiction, statutory or inherent or by the exercise of residual powers, to grant injunctive relief in matters where the seat of arbitration is outside Malaysia. In other words, the Arbitration Act 2005 only applies to domestic and international arbitrations and not foreign arbitrations. The Court of Appeal upheld the decision.

The effect of this decision confirms that Malaysia is now in breach of its treaty obligations as set out in 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. It is necessary for Parliament to amend the Arbitration Act 2005 to state that the section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia.

Until then, parties contemplating arbitration outside Malaysia, for example, in Singapore, Hong Kong, London, Paris or elsewhere, must recognise that they will not get any interlocutory relief from the Malaysian courts.

#### *Section 11 — Arbitration agreement and interim measures by High Court*

This section recognises the right of the court to intervene and grant interim measures of protection such as security for costs, discovery of documents and interrogatories, giving of evidence by affidavit, appointment of a receiver, securing the amount in dispute, the preservation, interim custody or sale of any property which is the subject matter of the dispute, ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the

dissipation of assets by a party, and an interim injunction or any other interim measures.

The parties in *I-Expo Sdn Bhd v TNB Engineering Corporation Sdn Bhd* [2007] 3 MLJ 53 entered into a contract where I-Expo agreed to decommission, dismantle TNB's power station and take the scrap material. TNB terminated the contract as I-Expo failed to pay sums of money and provide the required performance bond. TNB stopped I-Expo from entering the site. I-Expo applied for an injunction to allow it to enter the site and remove the scrap materials. TNB applied for a stay pending arbitration. The High Court held that it had power to grant interim relief even before the arbitration started.

The case of *Ikatan Innovasi Sdn Bhd v KACC Construction Sdn Bhd* [2008] 3 CLJ 48 involved the construction of a fire station and firemen quarters in Sibul, Sarawak. The main contractor was Javel whereas KACC were subcontractors and appointed Ikatan Innovasi as sub-subcontractors for the building portion works. Javel terminated KACC's employment. In turn, KACC terminated Ikatan Innovasi's employment. However, prior to the termination, KACC and Ikatan Innovasi were already in dispute and Ikatan Innovasi commenced arbitration on the dispute.

Ikatan Innovasi then found out that even after termination, KACC was still doing works for Javel. Ikatan Innovasi then filed an action against KACC and Javel for conspiracy, unlawful interference and applied to court for a *mareva* injunction against KACC.

The High Court held that the lack of probity between KACC and Javel was not an absolute factor and neither was the fact that KACC were bad paymasters. The court dismissed the application for the injunction on the basis that the risk of dissipation of assets was not shown.

### Chapter 3 — Composition of Arbitrators

#### *Section 12 — Number of arbitrators*

The composition of the arbitral tribunal is governed either by the arbitration agreement or by the Act. Parties are free to choose the number of arbitrators which constitutes the arbitral tribunal. If they fail to determine an agreed number, a sole arbitrator is presumed for domestic arbitrations, and three for international arbitrations.

#### *Section 13 — Appointment of arbitrators*

Section 13 deals with the appointment procedure for arbitrators and explains what is to happen in the event of a failure of the procedure or where no procedure was agreed upon.

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.

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 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.

#### *Section 14 — Grounds for challenge*

This section requires the arbitrator to disclose any circumstances likely to give rise to justifiable doubts to his impartiality or independence. It then sets out the two grounds on which arbitrators can be challenged. The first ground is circumstances which give rise to justifiable doubts as to the arbitrator's impartiality or independence. The second ground is that the arbitrator does not possess qualifications agreed to by the parties.

#### *Section 15 — Challenge procedure*

Parties are free to choose the challenge procedure. Failing such agreement, this section sets out the default position. Any challenge will be referred to the arbitrator who is required to decide upon it. If he does not withdraw or the other party disagrees with the challenge, the aggrieved party may apply within 30 days to the High Court for a final decision. No appeal lies against the High Court decision. In the meanwhile, the arbitral tribunal can continue with the arbitration.

#### *Section 16 — Failure or impossibility to act*

This section sets out the arbitrator's legal or physical inability to perform his functions as reasons for terminating his mandate.

#### *Section 17 — Appointment of substitute arbitrator*

This section facilitates the appointment of a substitute arbitrator. It also deals with the position of the arbitral proceedings where the arbitral tribunal has been reconstituted.

### **Chapter 4 — Jurisdiction of Arbitral Tribunal**

#### *Section 18 — Competence of arbitral tribunal to rule on its jurisdiction*

The Arbitration Act 1952 does not allow the arbitral tribunal to determine its own jurisdiction unless the parties confer the power on it to do so.



Section 18 now requires the arbitral tribunal to decide on its own jurisdiction based on the doctrines of *Kompetenz-Kompetenz* and separability. It also sets out the relevant time limits for raising it. The High Court has the final say on the issue of an arbitral tribunal's jurisdiction and no appeal lies against it.

The court in *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor* [2008] 1 MLJ 233 held that the arbitral tribunal had wider jurisdiction and powers under s 18 when its jurisdiction, competence and scope of authority was challenged and when the agreement was null and void.

The court in *CMS Energy Sdn Bhd v Poscon Corp* [2008] 6 MLJ 561 held that s 18 confers broad and wide powers on the arbitral tribunal to determine substantive issues and preliminary objections to its jurisdiction. Also, s 18 allows any party not happy with the preliminary rulings of the arbitral tribunal to appeal to the High Court within 30 days of its receipt. As such, there can be no irreparable prejudice to the parties if they submit to arbitration proceedings.

#### *Section 19 — Power of arbitral tribunal to order interim measures*

Section 19 allows the arbitral tribunal to order interim measures such as security for costs, discovery of documents and interrogatories, giving of evidence by affidavit and preservation, interim custody or sale of any property which is the subject matter of the dispute. It corresponds with parallel powers given to the High Court under s 11.

### **Chapter 5 — Conduct of Arbitral Proceedings**

#### *Section 20 — Equal treatment of parties*

This section places a duty on the arbitral tribunal to guarantee a fair trial by according parties equal treatment and fair and reasonable opportunity to present their cases.

#### *Section 21 — Determination of rules of procedure*

Section 21 allows the parties to determine the arbitral procedure. Failing this the matter of procedure reverts to the arbitral tribunal to conduct the arbitration in such manner as it considers appropriate. It also confers particular powers on the arbitral tribunal for purposes of determining the rules of the arbitral proceedings.

#### *Section 22 — Seat of arbitration*

This section sets out the juridical seat of the arbitration. The parties have the freedom to choose the seat of arbitration, failing which, the

arbitral tribunal has the default power to determine the seat of arbitration, having regard to the circumstances of the case, including the convenience of the parties. The section allows the arbitral tribunal to meet at any place without affecting the official seat of arbitration.

#### *Section 23 — Commencement of arbitral proceedings*

Parties are free to agree when arbitration proceedings are to commence. Failing which, s 23 states that arbitral proceedings commence on the date on which a request in writing for the dispute to be referred to arbitration is received by the respondent. The request for arbitration has the same effect on the running of limitation periods as in court proceedings.

The court in *Dancom Telecommunications (M) Sdn Bhd v Uniasia General Insurance Bhd* [2008] 5 CLJ 551 considered the issue of extension of time for commencing arbitration proceeding. The court reemphasised the doctrine of the freedom of contract. In line with the parties' intention, it reduced the statutorily prescribed limitation period from 6 years to 12 months as provided in the arbitration agreement.

#### *Section 24 — Language*

This section allows parties to determine the language of the proceedings by mutual agreement. It avoids the possible interpretation that the official court language namely, Bahasa Malaysia is obligatory for use in arbitral proceedings. In the absence of an agreement, the arbitral tribunal has the power to make the determination based on the principle of equality as set out in s 20. The arbitral tribunal is given the discretion to direct whether and to what extent to require translation into the language of the proceedings.

#### *Section 25 — Statements of claim and defence*

Section 25 sets out the procedure for identifying the issues in dispute at an early point in time and in a formal, judicial manner. Each party shall state the facts supporting its claim or defence and may submit documents or references to the evidence relied upon. Parties are allowed to amend their case unless the arbitral tribunal considers it inappropriate to allow it having regard to the delay in making it.

#### *Section 26 — Hearings*

Section 26 envisages two types of proceedings, namely, oral hearings and documents-only proceedings. There is a right to an oral hearing



unless both parties do not want it. The arbitral tribunal has a duty to give sufficient notice of hearing. The section sets out manner of communicating statements, documents and other information between the parties.

*Section 27 — Default of a party*

Section 27 deals with 4 situations where a party fails to fulfill its role in the arbitral proceedings in disregard of its earlier commitment to arbitration. It spells out the consequences of such a failure.

*Section 28 — Expert appointed by arbitral tribunal*

This section allows the arbitral tribunal to appoint experts. It sets out parties' duties towards such experts and the expert's duty to participate in a hearing on request.

*Section 29 — Court assistance in taking evidence*

Section 29 provides for the High Court to render assistance in taking evidence by securing the attendance of witnesses before the arbitral tribunal and makes available the power of the High Court to take evidence. The procedure allows any party with the approval of the arbitral tribunal to apply to the High Court for assistance and the High Court can order the attendance of the witness to give evidence (*subpoena ad testificandum*) or, where applicable, produce documents (*subpoena duces tecum*) on oath or affirmation before an officer of the High Court or any other person including the arbitral tribunal.

**Chapter 6 — Making of Award and Termination of Proceedings**

*Section 30 — Law applicable to substance of dispute*

Section 30 deals with the applicable law to the substance of the dispute. Curiously, for domestic arbitrations, the arbitral tribunal can only apply the substantive law of Malaysia (such as the Contracts Act 1950, the Limitation Act 1953, etc).

This provision follows the Indian Arbitration and Conciliation Act 1996. This is a regression from the Arbitration Act 1952, which does not restrict the choice of substantive law. It is hoped that Parliament will reconsider this point when amending the Act to uphold party autonomy.

The reverse is the case for international arbitration where the parties are allowed to choose the applicable substantive law.

*Section 31 — Decision making by panel of arbitrators*

This section provides that any decision or award of the arbitral tribunal comprising of more than one arbitrator shall be made by a majority of all its members. However, the parties are also given the option of agreeing to their own procedural provisions or to apply institutional rules which can provide for a far more detailed decision-making procedure than that set out in the section. The section also allows the parties or the arbitral tribunal to authorise a presiding arbitrator to decide questions of procedure for the sake of expediency and efficiency.

*Section 32 — Settlement*

This section provides that where parties during arbitral proceedings settle a dispute, the arbitral tribunal may terminate the arbitral proceedings and may record the settlement in the form of an award on agreed terms. An agreed award is one with the full import and consequences of an award made on merits. It ensures the dispute is finally dealt with and gives rise to the application of *issue estoppel* and *res judicata*.

*Section 33 — Form and contents of award*

Section 33 addresses the formalities of an award directed towards achieving a binding determination of the parties' dispute which can be enforced domestically or abroad. Under the Act, the arbitral tribunal can make four types of awards, namely, interim awards, additional awards, agreed awards and final awards (see ss 2, 10, 32 and 35).

All awards will have to be in writing, signed, with a statement of reasons, followed by the date and place of the award. The section also sets out the requirement for delivery of award and the authority for the award of post award interest.

*Section 34 — Termination of proceedings*

Section 34 sets out the situations in which the arbitration proceedings are considered to be terminated and consequently, the arbitral tribunal's mandate deemed as expired. These include situations that occur from the issuance of a final award, to the parties' agreement on the termination of the proceedings, or to the arbitral tribunal's finding that the continuation of the proceedings is unnecessary or impossible.



*Section 35 — Correction and interpretation of award or additional award*

This section extends the arbitral tribunal's mandate and allows the arbitral tribunal to rectify errors in computation, clerical or typographical errors or errors of a similar nature; give interpretation of a specific point or part of the award; to make an additional award as to the claims presented in the proceedings but omitted from the award.

*Section 36 — An award is final and binding*

Section 36 provides that an award made by the arbitral tribunal is final and binding on the parties and is enforceable against the losing party. It terminates the arbitration and extinguishes the original cause of action.

**Chapter 7 — Recourse Against Award**

*Section 37 — Application for setting aside*

Section 37 sets out the 8 jurisdictional and substantive grounds which may be relied upon by the High Court in setting aside an award.

Recourse against an arbitral award is now limited to the narrowly defined circumstances in line with modern international arbitral practice. 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 & Ors* [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 which had a bearing on the award.

However, there is a significant provision which allows the court to set aside an award in conflict with the public policy of the state that provides:

- (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. 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 troublesome. The main concern is that the floodgates may be opened by the courts by expanding the limited grounds for setting aside available to all cases where a detailed scrutiny of the procedure adopted in the arbitration becomes necessary. Such an application may have the impact of delaying the arbitral proceedings and enforcement.

## **Chapter 8 — Recognition and Enforcement of Awards**

### *Section 38 — Recognition and enforcement*

This section synchronises the procedures and requirements for recognition and enforcement of domestic awards and awards made in foreign states. However, the section 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.

In what seems a drafting error, the section only refers to domestic awards and awards made in foreign states; it seems to suggest that there is no provision for the enforcement of arbitral awards made in an international arbitration where the seat of arbitration is in Malaysia. This leaves a serious lacuna which would require parliamentary intervention.

### *Section 39 — Grounds for refusing recognition or enforcement*

This section provides grounds for refusal of recognition of an award. The grounds follow closely the grounds laid down in s 37 for setting aside an award. The applicant has to comply with the formal requirements, after that the onus of providing proof shifts to the party opposing recognition and enforcement.

It is significant that the 2005 Act does not repeal the Reciprocal Enforcement of Judgments Act 1958 (Act 99). The 1958 Act provides for the enforcement of arbitral awards from Commonwealth countries and scheduled countries as if it were a foreign judgment provided it is first registered as a judgment in the local courts of the country where the award was handed down.

The 2005 Act also does not prevent the common law remedy of suing on the foreign award as an action in court. However, it is unlikely that the remedy will be used in the light of the available statutory provisions.

**PART III — ADDITIONAL PROVISIONS RELATING TO ARBITRATION****Part III**

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 than 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.

*Section 40 — Consolidation of proceedings and concurrent hearings*

Section 40 allows for a consensual consolidation of arbitration proceedings with other arbitration proceedings which may be catered for in the arbitration agreement or more likely catered for in a subsequent ad hoc agreement. No special procedure is required and is left to the arbitral tribunal's discretion subject only to the agreement reached by the parties.

*Section 41 — Determination of preliminary point of law by court*

This is an improved version of the old 'statement of case procedure'. This section only allows a pre-award reference to the High Court only if the arbitral tribunal consents or the parties consent. Unilateral reference to the court as disallowed.

The High Court had to consider two prerequisites before considering the application. The applicant is required to satisfy the court that firstly, the determination of the question is likely to produce substantial saving of costs and secondly, the decision substantially affects his or their rights. However, while the application is being decided, the arbitration proceedings may be continued and an award may be made.



*Section 42 — Reference on questions of law*

The section provides for appeals post-award on a question of law not fact. It is trite that the arbitral tribunal's findings of fact are conclusive. Unfortunately, s 42 is vaguely worded to allow the raising to the High Court of any question of law 'arising out of an award' but does not provide the necessary guidelines to filter out frivolous applications designed merely to delay proceedings and enforcement.

Parliament may have to reconsider this point when amending the Act and introduce some form of filter mechanism to cut out tactical applications to delay enforcement of awards.

*Section 43 — Appeal*

This section states the High Court judgment under s 42 is deemed as one within the meaning of s 67 of the Courts of Judicature Act 1964 (Act 91). This ensures that there will be a right of appeal to the Court of Appeal from any decision made by the High Court under s 42.

*Section 44 — Costs and expenses of an arbitration*

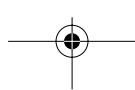
This section deals with costs and expenses of the arbitration. The major change is that the award will be taxed by the arbitral tribunal who would have detailed knowledge of the case and better equipped to handle the taxation. The High Court will only tax the award if the arbitral tribunal fails to do so.

The section also puts into statutory form the practice which operates as an exception to the general rule that costs 'follow the event' known as the *Calderbank offer*. The ruling principle involved is that the claimant should not be justified in refusing an offer and thereby unreasonably prolonging the arbitration proceedings.

A party can make an offer to the other party to settle the dispute for a certain amount either inclusive or exclusive of costs. This offer is communicated only to the other party, and is made without prejudice except as to costs.

If the offer is not accepted, the arbitration proceeds to an award. If the amount awarded is the same or less than the amount of the offer, then the respondent will generally be awarded the costs of the arbitration for the period from the making of the offer until the award.

The section recognises the implied right of the arbitral tribunal to claim a lien on the award for unpaid fees. The High Court is empowered to impose conditions on the delivery of the award.





*Section 45 — Extension of time for commencing arbitration proceedings*

This section provides the High Court with the power to extend time where an arbitration agreement provides that arbitral proceedings are to be commenced with a specified time.

The yardstick is ‘undue hardship in all the circumstances’. See *Dancom Telecommunications (M) Sdn Bhd v Uniasia General Insurance Bhd* [2008] 6 MLJ 52; [2008] 5 CLJ 551.

*Section 46 — Extension of time for making award*

This section provides the High Court with the power to extend time where the arbitration agreement provides for an arbitral award to be made within a fixed time frame and the parties are enable to able to extend time.

**PART IV — MISCELLANEOUS**

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.

*Section 47 — Liability of arbitrator*

This section provides statutory immunity for the arbitral tribunal which will be a defence to all causes of action, whether in contract, tort or otherwise. Such immunity is in the discharge of the arbitral function and not done in bad faith.

*Section 48 — Immunity of arbitral institutions*

This section extends the immunity to arbitral institutions in the discharge of their functions to appoint or nominate an arbitrator.

*Section 49 — Bankruptcy*

This section re-enacts s 5(1) of the 1952 Act. Supervening bankruptcy does not put an end to the arbitration agreement unless the arbitration agreement itself provides for this.

*Section 50 — Mode of Application*

All applications to the High Court are to be made by an originating summons as provided in the Rules of the High Court. Order 69 of the

Rules of the High Court needs to be amended and brought up to date. But, by virtue of s 76 of the Interpretation Acts 1948 and 1967, references in O 69 to 'the Act' may be treated as references to the 2005 Act. Those provisions of O 69 not in conflict with the Act may still be applied.

### *Section 51 — Repeal and saving*

This section repeals the 1952 Act and also, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1958 (the New York Convention Act).

The Act does not repeal the Reciprocal Enforcement of Judgments Act 1958 (Act 99), which accordingly remains in force. This Act provides an indirect method of enforcing foreign arbitration proceedings where the successful party converts the arbitral award into a judgment.

According to the English version of s 51(2), the Act will be applicable to all arbitration proceedings commenced on or after 15 March 2006, while the 1952 Act will continue to apply to arbitration proceedings before that date. However, the Bahasa Malaysia translation states that the Act does not apply where the arbitration agreement was made or proceedings were commenced before that date.

See discussion above on which Act applies and case of *Putrajaya v Digital Green Sdn Bhd* [2008] 7 MLJ 757.

### **CONCLUSION**

The 2005 Act is a welcome change to the law, practice and procedure of arbitration in Malaysia. It brings Malaysia in line with modern international practice of allowing parties to arbitrate if they wish to do so. It is a preferred method of resolving disputes involving parties from different jurisdictions.

The decisions in some court cases dealing with arbitration matters are already raising issues. However, the detailed assessment of the merits of the 2005 Act will have to wait longer as the pace of arbitrations pick up together and related court actions fully crystallise.

The strong point is that the 2005 Act has taken a bold internationalist approach to arbitration as it is conceived to keep pace with global developments based on, though not identical to UNCITRAL Model Law.