

ARBITRATION AND MEDIATION IN MALAYSIA

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Arbitration

Arbitration in Malaysia is governed by the Arbitration Act, 1952. This Act substantially follows the UK Arbitration Act, 1950. Admittedly, this piece of legislation is archaic and the Government has requested the Malaysian Bar Council to come up with a proposed new draft Act adopting the UNCITRAL Model Law. The Malaysian Bar Council has finalised the draft Act and had forwarded to the Attorney General Chambers for their consideration. Until the proposed draft Act is enacted into laws, the Arbitration Act, 1952 applies.

The Arbitration Act, 1952 provides judicial intervention in various sections of the Act.

- a) Section 3 provides that except where the agreement between the parties intends otherwise, the authority of an arbitrator is only revocable with the leave of the High Court.
- b) Section 5 provides for the High Court to order the determination by arbitration of issues relating to bankruptcy proceedings.
- c) Section 6 provides for power to stay proceedings where there is submission to arbitration.
- d) Section 7 gives jurisdiction to the High Court to give effect to an arbitration agreement to which claimants in interpleader proceedings are parties.
- e) Section 9 provides for power of parties in certain cases to appoint arbitrators and the High Court has jurisdiction to set aside such appointment in certain cases.
- f) Section 10 gives jurisdiction to the High Court to order the umpire to be the sole arbitrator.
- g) Section 13 gives power to the High Court to issue subpoenas, to compel attendances of witnesses before an arbitrator and also to order security for costs, discovery, interrogatories and giving of evidence by way of affidavit.

- h) Section 14 provides the High Court with power to extend time limit for making award and also for removal of an arbitrator or umpire, who fails to proceed with the arbitration with reasonable dispatch.
- i) Section 12 provides the High Court with the power to appoint arbitrator or umpire in certain circumstances.
- j) Section 19 provides for taxation of costs to be done in the High Court if the arbitrator fails to do so.
- k) Section 22 gives power to the arbitrator to refer any questions of law in the form of a special case for the decision of the High Court.
- l) Section 23 gives power to the High Court to revert the matter for reconsideration by the arbitrator.
- m) Section 24 provides for removal of the arbitrator in certain circumstances i.e. misconduct.
- n) Section 25 gives power to the High Court to give relief where arbitrator is not impartial or the dispute involves question of fraud.
- o) Section 26 gives power to appoint arbitrator where the earlier arbitrator is removed.
- p) Section 27 provides for enforcement of award.

Apart from the above sections which confers jurisdiction to the High Court, the act also deals with various other matters relating to powers of arbitrators, their appointment etc.

The said Act, does not define the term “arbitration”. However the Malaysian Courts have generally recognised the validity of arbitration agreements so long as it is not ambiguous or uncertain. If a party files an action in court when there is a provision in their agreement for referring a dispute to an arbitrator, the other party can apply to court for a stay of proceedings pending arbitration and the said party must do so before taking any other steps in the proceedings (See Section 6).

Earlier there has been some confusion whether filing of an appearance amounts to the Defendant had taken a step in the proceedings and thus precluded himself from the order staying the proceedings. See the case of *The ‘Dong Moon’ Trans Asia Shipping Co. Ltd v ‘Dong Moon’ Owners* (1979) 1 MLJ 152 and *Usahabina v Anuar Bin Yahya* (1998) 7 MLJ 691. However, the Federal Court in *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* (2002) 2 MLJ 625, *held*:

- a) *The entering of appearance is a mandatory procedural step to be taken by an applicant in a proceeding in the High Court. It was a step in the proceedings as required by the Rules of the High Court.*

- b) *However the entering of appearance whether it is conditional or unconditional is permitted and is excluded as a step or is an exempted step in the proceedings within the meaning of the Section 6 of the Act which would prejudice the applicant's rights to apply for a stay of the proceedings.*
- c) *If the applicant has served any pleadings then he has clearly taken a step in the meaning of Section 6 of the Act.*
- d) *If the applicant has taken any other action in the proceedings (other than the entering of appearance or service of pleadings) the court will then have to consider whether such an action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed off by arbitration.*

Reform of Arbitration Law

As mentioned earlier, the Bar Council has finalised a draft Arbitration Act and had forwarded the same to the Attorney General's Chambers.

The said draft Arbitration Act is based on the New Zealand model. The Committee deliberated as to whether we should have separate Acts for domestic arbitration and international arbitration or to have one Act to cater for both. The New Zealand model is attractive as it gives greater party autonomy and provides for opting in and opting out. The Committee is also in agreement that the UNCITRAL Model Law be used for the international arbitration

Having decided that there should be two arbitral regimes (domestic and international) and that the international regime should be based on the Model Law, the Committee had to deal with the issue namely what are the provisions which we would like to apply for domestic arbitration. On a careful study of the Model Law, one can see that the principles are equally applicable to the domestic arbitration as well with some variations. The New Zealand Arbitration Act 1996 laid down certain objectives inter alia:-

- a) to promote international consistency of arbitral regimes based on the Model Law.
- b) to promote consistency between the international and domestic arbitral regimes.

These objectives are very appealing to the Committee. Further the New Zealand Act also introduces 2 schedules:-

- a) a First Schedule, which follows the Model Law with relatively minor additions and variations, and which applies to all arbitrations held in the jurisdiction;

- b) a Second Schedule, which contains additional material provisions which:-
- apply to domestic arbitration, unless the parties otherwise agree (opting out);
 - apply to international arbitrations, only if the parties so agree (opting in).

Hence the Committee drafted the draft Arbitration Act based on the New Zealand model and taking into account the development of arbitration laws in the country since 1952.

The Regional Centre for Arbitration Kuala Lumpur

This Centre was set up in 1978 pursuant to a decision taken by the Asian African Legal Consultative Committee. The Malaysian government gave assurance that it would respect the independent functioning of the Centre as an International Arbitration Centre. To give effect to this assurance, the Arbitration Act 1952 was amended to incorporate a new Section 34 which reads as follows:-

- 34(1) 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 at Kuala Lumpur.
- 34(2) Where an award made in an arbitration held in conformity with the Convention or the Rules specified in subsection (1) is sought to be enforced in Malaysia, the enforcement proceedings in respect thereof shall be taken in accordance with the provisions of the Convention specified in subsection (1) or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, as may be appropriate.
- 34(3) The competent court for the purpose of such enforcement shall be the High Court.

By incorporating this new Section 34, the supervisory jurisdiction of the High Court over the KLRCA has been excluded.

As an International Arbitration Institute the KLRCA has its own rules for arbitration. The rules provides for disputes to be settled in accordance with the arbitration rules made by United Nation Commission on International Trade Law (the UNCITRAL Rules) as modified by the Rules of KLRCA. The KLRCA rules allow a great deal of flexibility in the conduct of proceedings of the arbitration. It

leaves a wide discretion to the parties in regard to the choice of the arbitrators, the place of arbitration and the applicability of the procedural rules.

The KLRCA imposes an administrative charges, advises parties on the applicable rules, appoint arbitrators (where there is a default of appointment), decides on the amount of the arbitrators fees and collects deposits. It also provides the venue for arbitration, technical facilities and other assistance.

MEDIATION

In 1995, the Bar Council set up an Alternative Dispute Resolution (ADR) Committee to look into the possibility of setting up a Mediation Centre in Malaysia.

The ADR Committee made an indepth study of the various mode of alternative dispute resolution practised in the Commonwealth as well as the United States of America. Members of the Singapore Mediation Centre were invited to make presentation of their Centre.

After a thorough study of the various modes of ADR and in particular Mediation, the Bar Council set up the Malaysian Mediation Centre (MMC) on 5th of November 1999. At the time of setting up the Centre, we only had about 27 Mediators who have gone through a 3-day study of Mediation techniques conducted by members of the Singapore Mediation Centre and the Law Society of Singapore. We were indeed grateful to the Singapore Mediation Centre and the Law Society of Singapore for their contribution in making MMC a reality.

Malaysian Mediation Centre (MMC)

It is established under the auspices of the Bar Council with the objectives of promoting Mediation as a means of alternative dispute resolution and to provide a proper avenue for successful dispute resolution. The MMC is located at the 3rd Floor of the Bar Council building at 13.15,17, Leboh Pasar Besar, 50050 Kuala Lumpur. The ADR Committee of the Bar Council is responsible for the proper functioning and implementation of the Centre's objectives.

The Centre offers the following services:-

- a) Mediation Services;
- b) Assist and advise on how to get the other side to agree to mediation if one party has shown interest;
- c) Provides Mediation training for those interested in becoming Mediators and accredits and maintains a panel of mediators.

Currently the Centre accepts civil, commercial and matrimonial matters and intends to expand the scope to other matters at a later stage.

Mediators of the Centre are subject to a code of conduct which provides for a strict compliance of impartiality and confidentiality.

The Centre has its own rules for purpose of accreditation of Mediators. All Mediators of the Centre must be a practising member of the Malaysian Bar of at least 7 years standing. He/She must have completed at least 40 hours of training conducted and organised by the Centre and must also pass a practical assessment conducted by the trainers. The initial 27 Mediators also subsequently went through this process.

The Mediators of the Centre are now trained by either the Accord Group or LEADR of Australia. To date, we have about 300 Mediators on our panel.

On application to the Centre, a Mediation Kit will be provided. The Kit contains the following:-

- a) Mediation Agreement;
- b) Mediation Rules
- c) Mediators Code of Conduct
- d) Settlement Agreement (draft)
- e) List of Mediators.

A) Mediation Agreement

The Agreement provides for the parties to appoint a suitable Mediator of their choice or if not, the Mediator selected by the MMC. The Agreement also provides that the Mediation will be conducted under the Mediation Rules of the Centre. The Agreement also requires that the parties must act in good faith. This is an important element of mediation. Apart from that, it provides for confidentiality of the said process. Parties are not to disclose any information of document given to them during the dispute resolution process. Parties that attend the mediation sessions must be cloaked with authority to settle and in the event they do not have the full authority to settle they must disclose to the Mediator.

B) Mediation Rules

The Rules provide the process of initiating mediation, appointment of Mediators, disqualification of Mediators, vacancies, representation, authority of Mediator, mode of settlement agreement, confidentiality, termination of Mediator and the interpretation of the Rules.

Proposal for Reform

The ADR Committee of the Bar Council has recommended to the Statutory Rules Committee to incorporate Mediation in the Rules of the High Court during the stage of case management. The Statutory Rules Committee is in the midst of finalising the same. Hopefully thereafter more cases will be referred to the Malaysian Mediation Centre.