# ALTERNATIVE DISPUTE RESOLUTION IN MALAYSIA

**DATO' CECIL ABRAHAM**

## INTRODUCTION

The methods of alternative dispute resolution (ADR) in Malaysia are principally mediation, conciliation, adjudication and arbitration. These methods of ADR are becoming increasingly popular mechanisms to resolve disputes. Many perceive litigation as time-consuming and believe that these methods of ADR would save time costs, can resolve their disputes in confidence and also that it will not create ill-will or animosity as it sometimes does, in litigation. However, it is a misconception to think that arbitration in particular, is less expensive to a litigation.

### Mediation

The concept of mediation is nothing novel but is a set of Eastern values and teachings, which has been conceptualised by the West and structured as it is an invention of theirs. The fundamentals of mediation, i.e., the encouragement of settlement by the assistance of a third party, has been a practice of the East for centuries and the roots can be traced back to the teachings of Islam, Hinduism, Buddhism, Christianity and the teachings of Confucius. Malaysia, a country with multitude of faiths and religions has been a host for the practice of mediation amongst its recipients. In Islam, mediation is an indispensable condition and is represented by the word *shafa'a,*[1] whilst in Hinduism; the mediation process is reflective in the text of its scriptures as well as in the concept of the *panchayat.*[2] So great was the emphasis of harmony and the resolution of dispute in an

[1] This means intercession and embraces the concepts of equality and to even up. http://www.yaNabi.com

[2] Panchayat is a practice in the villages' to mediate the problems of villagers. The *panchayat* is usually comprised of the village head alongside a few other senior members.

amicable manner to Confucius that a proverb was couched to express his dissatisfaction to the adversarial process "in death avoid hell, in life avoid law courts". [3]

Mediation is also evidenced in the rural areas of Malaysia by the determination of dispute by the 'penghulu'. The Penghulu, is the chief or head of the village who is asked to preside over a dispute, in the capacity of a middleman.

Despite evidence of mediation in early Malaysian history, the practice of mediation in its conceptualised form is still at its embryonic stages. So far, only Persatuan Insuran Am Malaysia[4] ("PIAM"), the Banking Mediation Bureau ("BMB"), the Housing Buyers Tribunal ("HBT") and the Tribunal for Consumer Claims ("CCM") have facilitated statutory mediation.

**Statutory Mediation**

(i) **PIAM**

PIAM's Complaints Action Bureau or Insurance Mediation Bureau ("IMB")[5] acts to assist the resolution of any consumer complaints between Insurance companies and the consumers/policyholders in an independent, cost-effective,[6] efficient, informal and fair way.

[3] Tanya Kozak, 'International Commercial Arbitration, Mediation at CIETAC' (China International Economic and Trade Arbitration Commission), http://www.cfcj-fcjc.org/full-text/kozak.htm

[4] General Insurance Society of Malaysia

[5] http://www.liam.org.my/liam/homepage/bureau.htm

[6] The services of the mediator are free of charge.

(ii) **Banking Mediation Bureau**

The Banking Mediation Bureau (BMB)[7] was established under the Companies Act 1965, with an objective of settling disputes between the banking institution and their customers. The services of the BMB are free of charge and currently, its role is restricted to disputes/complaints involving direct monetary loss not exceeding RM25,000 arising from the following:

(a) charging of excessive fees, interest and penalties;
(b) misleading advertisements;
(c) unauthorised Automatic Teller Machine withdrawals;
(d) unauthorised use of credit cards; and
(e) unfair practice of pursuing actions against guarantors.

The BMB can only address complaints against commercial banks, finance companies and merchant banks licensed under the Banking and Financial Institutions Act 1989 ("BAFIA").[8] The BMB only deals with complaints, which have first been lodged with the banking institution concerned.

(iii) ***The Housing Buyers Tribunal***

The Housing Buyers Tribunal ("HBT")[9] was set up by the Ministry of Housing ("the Ministry") to assist parties in dispute over housing matters,[10] the mechanics of which are provided by Section 16 of the Housing Development (Control and Licensing)

---

[7] National House Buyers Association (Persatuan Kebangsaan Pembeli Rumah) http://www.hba.org.my

[8] http://www.bankinginfo.com.my/index.php

[9] Y.Y. Choy, 'Relief in Sight? – A Housing Buyers Tribunal (Part I), at http://www.hba.org.my There is also in place a Housing Development (Tribunal For Homebuyer Claims) Regulations 2002, PU(A) 476/2002.

[10] The Ministry appoints the Chairman, Deputy Chairman and not less than 5 other members from the Judicial and Legal Service or from senior members (at least 7 years of legal practice) of the Malaysian Bar as officers of the Tribunal. Y.Y. Choy, 'Relief in Sight? – A Housing Buyers Tribunal (Part II), at http://www.hba.org.my

Act 1966 ("Housing Development Act").[11] Recourse to the HBT is subject to certain qualifications and they are as follows:

(a) complainants, must be purchasers or subsequent purchasers of housing accommodation built by developers (falling within the scope of the Housing Development Act);

(b) the complaints must refer to the terms of sale and purchase agreements[12] entered into between the developers and purchasers;

(c) the claims must not be in respect of the following: recovery of land, interest and estate, entitlement under will, settlement or intestacy, goodwill, chose in action,[13] trade secret and intellectual property;

(d) the value of the claims or losses must not exceed RM25,000; [14]

(e) the complainants must submit their claims within one year (either from the date of the issuance of Certificate of Fitness or before the date of expiry of the defects period of the accommodation), failing which the HBT will not entertain the claims; and

---

[11] This Act is catered to resolve the problems arising between developers and purchasers. Section 16 of the Housing Development Act *inter alia* provides the following:

(a) the various powers to hear complaints;
(b) the jurisdiction of the tribunal;
(c) the procedure to follow;
(d) the remedies of the parties; and
(f) the enforcement of remedies.

[12] The sale and purchase agreements are those agreements in Schedule G and Schedule H of Housing Developers (Control and Licensing) Regulations 1989. These are statutory terms and conditions for developers and purchasers to follow in the transaction of housing accommodation.

[13] For example, suits based on action in court like shares and stocks.

[14] However, this limitation can be superseded provided the developers and purchasers are willing to submit their dispute to the HBT by way of an agreement or if the claimant is prepared to abandon the excess claim above RM25,000 in order to qualify for the jurisdiction of the HBT. For example, if a claim is RM70,000 and the claimant is prepared to accept an award up to RM25,000 he is allowed to lodge his claim

(f) the complaints should not be of matters pending before the court.

### (iv) **The Tribunal For Consumer Claims**[15]

The CCM[16] is an independent body established under the Consumer Protection Act 1999 ("CPA")[17] with the primary function of hearing and determining claims filed by consumers under the CPA. Although, the CCM does not expressly use the word mediation, the procedure is very similar to the HBT. The ADR mechanism employed in the CCM leans towards negotiation but the services provided are nevertheless worthy of examination.

The jurisdiction of the CCM is limited to a claim that is based on a cause of action which accrues within three years of the claim. The CCM has the jurisdiction to hear and determine-

(a) any claim[18] in respect of any matter within its jurisdiction provided under the CPA;

(b) the total amount claimed does not exceed RM10,000; and

---

in the HBT. However, the claimant is not allowed to separate his claim in order to bring the claim within the jurisdiction of the HBT.

[15] Noor Azian Binti Shaari, 'Tribunals For Consumer Claims: The Malaysian Experience', **http://www.aija.org.au/Tribs03/rtf/Malaysia.rtf**

[16] The CCM was established under the Ministry of Domestic Trade and Consumer Affairs and came into operations on 15 November 1999.

[17] The Act shall apply in respect of all goods and services that are offered or supplied to one or more consumers in trade. Section 2(1), CPA

[18] For example, a claim may be lodged for any loss suffered on any matter concerning his/her interests as a consumer arising from –

- a false or misleading conduct, false representation or unfair practice.
- safety of goods and services.
- right against a supplier in connection with guarantee.
- right against a supplier in connection with any guarantee implied by the Act in relation to services.
- right against a manufacturer in connection with any express guarantee given by the manufacturer.

(c) any other matter prescribed by the Minister by an order published in the gazette.

The CCM has no jurisdiction in respect of any claim:

(a) arising from personal injury or death;

(b) for the recovery of land, or any estate or interest in land;

(c) in which the title to any land, or any estate or interest in land, or any franchise, is in question;

(d) in which there is a dispute concerning (the entitlement of any person under a will or settlement or on any intestacy; goodwill; any chose in a claim; or any trade secret or other intellectual property).

**The Malaysian Mediation Centre (MMC)**

The Malaysian Bar Council set up the Malaysian Mediation Centre ("MMC") in 1999. The MMC caters for all types of commercial and matrimonial disputes in the country and is accessible to all parties.[19] There is no monetary limit on the claims that can come within its jurisdiction and the scope of its practice is unlimited.[20] The MMC has 135 registered mediators and a total of 131 cases have been referred to mediation.[21]

**The Use of Court-Annexed Mediation**

Formalised ADR can be seen in some aspect of Malaysian law,[22] such as the Workmen's Compensation Act 1952, Trade Unions Act 1959, the Industrial Relations Act 1967 ("Industrial Relations Act") and the Employment Act 1955 which provide for

[19] Yong Yung Choy, 'Extending Mediation Practice to the Banking Industry', [2002] 3 MLJ cxc at pxciv.

[20] Ibid at p cxcv.

[21] These figures were provided by the Bar Council

[22] Rozlinda Fadzil and Mohd. Haris Abdul Rani, 'Negotiations, Mediation, Litigation, Arbitration: Significance of Arbitration; Arbitration Agreement; Governing Law; Conduct of Proceedings',

statutory arbitration and/or mediation.[23] Section 18 of the Industrial Relations Act 1967, provides for the disputants in a trade dispute, to refer the dispute to the Director General who shall "take such steps as may be necessary or expedient for promoting an expeditious settlement thereof". [24] Section 106 of the Law Reform (Marriage and Divorce) Act 1976 which disallows disputing couples from filing their divorce petition for the dissolution of their marriage until they have attended the reconciliation tribunals in an attempt to resolve their problem.

What are the other cases in which court-annexed mediation would be appropriate? Court-annexed mediation would be appropriate in the following instances:

(a) **cases which involve neighbourhood and community** issues such as boundary disputes, nuisance and children;[25]

(b) **issues of management, pay and dismissals in the workplace**;[26]

(c) **small claims (claims with a value of less than RM25,000);**[27]

(d) **issues arising in tort** (including negligence, failure of duties and insurance claims); and

---

http://www.mlj.com.my/free/articles/rozlinda&harris.htm Others like Syariah Civil Procedure Code 1991, Insurance Mediation Bureau, Bar Council and Association of Banks Malaysia.

[23] Ibid. Arbitration Procedures in Asia, gen ed Be Beaumont, Hong Kong, Sweet and Maxwell, 1999.

[24] Chia Loong Thye and Phee Boon Leng, 12th Biennial Malaysian Law Conference, 'Mediation the role of the judiciary and the bar in promoting mediation', 10-12 December 2003, p13.

[25] Also included in this are issues concerning gender, race and ethnicity.

[26] A recent article in the Star newspaper has also reported the Government's resolution to make mediation mandatory in industrial cases. The Star 20.5.2004, http://www.thestar.com.my

[27] Adopting the distinction applied in the UK Civil Procedure Rules where claims are distributed to different tracks i.e. small track, fast track and multi track, depending on the value of the claim, severity, number of witnesses to be called and other factors.

(e) **cases which do not involve complicated issues of law** (construction disputes and contracts for supply and delivery which primarily centre on the agreement to comply with an agreed schedule of works).

**Issues Arising in Tort**

**Mediation in Medical Negligence Cases**

Medical negligence litigation is on the rise in Malaysia as people become more in tune with medical developments as well as their ability to sue doctors. Currently, there are more than 3,000 healthcare personnel who are registered members of the Medical Protection Society.[28] This figure in itself suggests the level of precaution taken by medical personnel against the harsh consequences of litigation. The figure also suggests the number of potential medico-legal cases that may be brought before the courts in the near future.

Most medical negligence claims are pursued for information (as opposed to compensation) of the events on the fateful day. Litigation is unsatisfactory in the circumstances, as it does not address the 'qualitative needs' of the patient. Mediation is a more appropriate forum as it enables the doctor to admit fault (if any), explain the variety of procedures available in treating the said patient and assure the complainant that all the necessary steps were taken during the operation.[29] Mediation should also be practiced in the resolution of medical disputes as it:

(i) reduces the damage suffered by the Defendant medical practitioners as a result of negative publicity;

[28] Http://www.medicalprotection.org/medical/Malaysia

[29] Robert Lazar, 'Medical Mediation: Litigation vs Mediation' Seminar on Legal Issues in Medical Law: Strategy for the future, Lexis Nexis and Asean Lawyers Association of Malaysia, reported in an article by Loh Foon Fong in 'Taking it Out', 5.7.2004, http://www.thestar.com.my

(ii) provides speedier justice to the patient affected by the alleged negligence;[30] and

(iii) curtails the expenses incurred for litigation.

The Malaysian Medical Association ("MMA") supports mediation in the resolution of medico-legal disputes and the recent Commonwealth Medico-Legal Conference[31] is illustrative of the MMA's efforts to bring these issues into the public arena for discussion. [32]

**Cases which do not involve complicated issues of law**

**Mediation in Professional Societies**

This is another area which has significant room for the practice of mediation. The Institution of Architects Malaysia (PAM) have recognised this aspect and have revised their standard building contract forms by incorporating into the contract a provision for mediation alongside the arbitration clause. PAM has also set out rules for the provision of mediation and these rules are known as the Architects of Malaysia Mediation Rules.

**Mediation in Sports**

Established sporting and leisure associations should also adopt the practice of mediation in the resolution of their dispute. A News Straits Times Article reported on 23.1.2002 [33] that the Olympic Council of Malaysia were expediting the setting up of a

---

[30] 'ADR Systems For Speedy resolution of Cases', Medical tribune, 15.5.2003, http://www.medicaltribune,net/disperchcontent.cfrm?pg=1&id=10720

[31] This conference was held between 17.1.2003-19.1.2003 at the Grand Seasons Hotel, Kuala Lumpur.

[32] Editorial article NST 'Finding A Remedy', 24.2.2003, http://www.mma.org.my/_urrent_topic/letter.feb2003.htm

[33] 'Court of Arbitration to save 'sinking' MAAU', NST-sport 23.1.2002. http://www.nst.com.my/Current_News/NST/Friday/Sport/20040723082237/Article/indexb_html

court of arbitration due to the increased cases of degradation and suspension threats faced by the Malaysian Amateur Athletics Union ("MAAU"). The article also reported the constitution of a mediation panel to further facilitate the dispute resolution.

The incorporation of mediation in the above examples serves as an effective and cost efficient scheme for the following reasons:

(a) the dispute is dealt with in a familiar surrounding, usually in the premises of the association;

(b) the mediator is able to fully understand and absorb the facts of the case as the mediator would be either an accredited member within the association and/or an expert in that field;

(c) preserves the relationship between parties; and

(d) avoids negative publicity.

All efforts taken to develop in Malaysia would prove fruitless if there is no support from the courts. As the centre for justice, the courts play a crucial role towards the development of mediation and this is discussion is twofold:

(a) mediation in the lower courts; and
(b) mediation in the high courts.

**Mediation in the Lower Courts**

Order 54 of the Subordinate Court Rules 1980 ("SCR") provides for the determination of dispute via a small claims procedure. Rule 13 of this order makes the provision for settlement whereby the courts, at the hearing of the matter, assist parties where possible to effect a settlement by consent. The provision for settlement is advocated too late a stage in the small claims procedure. It would be more appropriate if

the court had the power to assist settlement between the parties at the initial stages of the claim.

**Mediation in the High Court – Order 34 RHC 1980**

Turning to the promotion of mediation in the High Court, reference is made to Order 34 Rules of the High Court 1980 ("RHC"). Order 34 RHC is an order governing the principles of pre-trial case management. Rule 4(2) of this Order provides the judge with a list of directions which he/she may give to the parties' during the course of the pre-trial case management. No mention is made on the use of ADR.

In the United Kingdom ("UK"), Rule 1.4 of the Civil Procedure Rules ("CPR") obliges the court to further the overriding objective by actively managing cases. Rule 1.4(2), particularly, sub (e)[34] and (f),[35] gives the court the power to encourage settlement via the use of ADR. It also imposes on the court, as part of its case management powers, the duty to assist parties to settle the whole or part of the case. The emphasis on settlement is so great in the UK that the courts are allowed to consider the conduct and effort of the parties to settle before the commencement of litigation, when making an assessment on costs.

The Rules Committee in Malaysia is presently looking to amend Order 34 of the RHC, to make mediation compulsory and the amendments to the Rules are in the pipeline and so is a Mediation Act.

**Adjudication**

Adjudication as a concept is quite new in Malaysia. Adjudication which primarily involves a 3rd party making a decision during the currency of the Project pending the completion of the works or termination of the contract is a good concept as it enables parties to have a binding decision until they can litigate or arbitrate their substantive

[34] 1.4(2)(e) "encouraging the parties to use an alternative dispute resolution process if the court considers it appropriate and facilitating the use of such process".

dispute. In this area the construction industry has taken the initiative. The various Standard Forms in construction contracts used in Malaysia tend to have a clause that enables the Superintending Officer to make a temporary decision binding on the parties until the works are completed.

Bearing in mind that an adjudication is in place (at least temporarily) the parties can thereafter focus the energies to completing the works. More often than not once there is a successful completion most of the intermediate grievances are forgotten.

The Construction Industry Development Board (CIDB) together with the relevant government ministries is presently in the process of putting together a statute that provides for adjudication in the construction industry, primarily to ensure security of payment for contractors during the currency of the contract.

**Arbitration**

In Malaysia, there are two regimes governing arbitration, namely the Arbitration Act 1952 and the new Arbitration Act 2005, which came into effect on the 14th of March 2006.

**Arbitration Act 1952**

The Act applies to both domestic and international arbitration. The Act is in *pari materia* with the English Arbitration Act of 1950. The other relevant legislation include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985. Malaysia is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"). The New York Convention has the force of law in Malaysia by virtue of the Convention on the Recognition and Enforcement of Foreign Awards Act 1985 ("the New York Convention Act").

---

[35] 1.4(2)(f) "helping the parties settle the whole or part of the case".

**Arbitration Agreement**

An "arbitration agreement" means "*a written agreement to submit present or future differences to arbitration, whether an arbitrator is named herein or not*." It should be noted that while writing is a mandatory requirement, no specific form of arbitration clause is stipulated in the Act and the parties are free to agree on the format and wordings of such a clause.

**Stay of Proceedings**

The existence of an arbitration agreement does not automatically oust the jurisdiction of the courts. A party to an arbitration agreement may file an action in court notwithstanding the existence of an arbitration agreement to deal with such disputes. The other party may then bring an application to stay the court proceedings pending reference to arbitration. The Act empowers the High Court to order a stay of proceedings pending arbitration. It provides for a discretionary stay of proceedings in favour of arbitration. The court may order a stay of court proceedings where there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement and where the applicant for the stay has been willing to properly conduct arbitration.

The general approach of the courts, however, is to stay court proceedings in favour of arbitration unless some exceptional reasons exist.

A court will order a stay of proceedings only if it is satisfied that the applicant for the stay is ready and willing to properly conduct the arbitration. For the court to be so satisfied, the applicant must at least state in the affidavit that he was and is willing to do all things necessary for the proper conduct of arbitration. In addition, the defendant must satisfy the Court that it was and is ready and willing to do all things necessary to the proper conduct of the arbitration through its subsequent actions as well.

Where allegations of fraud are made, the court has the discretion to stay the arbitration proceedings. The party charged with fraud is entitled as of right to a stay of

arbitration, whereas a party charging the other with fraud can seek the discretion of the court. The applicant need to show only a *bona fide* allegation of fraud at the stage of the application; the allegation of fraud need only be proven beyond reasonable doubt at the trial stage.

**Procedural Matters**

Procedural rules are entirely a matter for the parties to agree. To this extent, the parties may set their own rules or adopt rules of arbitration institutions (with modifications, if they so choose). The only possible restriction on such an agreed procedure is that it must not contravene the principles of natural justice. Where the agreed procedure contravenes the principles of natural justice, the local courts may remove the arbitrator or set aside the award. The local courts may also refuse enforcement of awards that are procured in breach of the principles of natural justice.

**Appointment of Arbitrators**

Generally, the parties are free to agree on the procedure for the appointment of arbitrators. However, where the parties fail to agree on the procedure for the appointment of arbitrators (this can be done by adopting a set of institutional rules which has such a procedure) and if there is no default procedure applicable, the parties can apply to the High Court to appoint an arbitrator.

While there is no positive assertion as to the qualification and the requirement of an arbitrator, the Act does require an arbitrator to be impartial. The arbitrator is also required under the Act not to misconduct himself or the proceedings. Partiality and/or misconduct on the part of an arbitrator may lead to the removal of the arbitrator, or the setting aside of the award.

**Powers of Arbitrators**

There are no restrictions on the arbitrators' powers to order any preliminary or interim relief. The parties may expressly confer any such powers on the arbitrators.

However, an arbitrator has no authority to issue an order to a third party. For example, an arbitrator cannot order a third party to give evidence or produce documents. The High Court has, on the other hand, the power to order a third party to give evidence or produce documents, and/or to issue an order to bring up a prisoner for examination before an arbitrator.

The Act expressly provides the High Court *inter alia* the power to order security for costs, discovery of documents and interrogatories, giving of evidence by affidavit, examination of a witness outside jurisdiction, preservation, interim custody or sale of any goods that are the subject matter of the reference, detention, preservation or inspection of any property or thing that is the subject of the reference, and interim injunctions or appointment of a receiver. These powers granted to the High Court do not prejudice any similar powers that may be vested in an arbitrator.

The local courts generally tend to take a pro-arbitration approach, extending support to arbitration proceedings unless there are prohibiting reasons.

**Representation by Foreigners**

It must also be noted that the Malaysian law allows the parties to choose any person to represent them, and unlike some other jurisdictions, there are no requirements as to representation by Malaysian lawyers or even by legally qualified persons.

**Evidentiary Issues**

The Malaysian Evidence Act provides that its provisions do not bind the arbitrators. While this may relieve the arbitrators from following the strict rules of evidence, they are nevertheless expected to follow the established principles of evidence. Departing from those principles may lead to their removal and/or the setting aside of the award. The courts have set aside awards *inter alia* where the arbitrators had failed to properly appraise the material evidence before them or rely on inadmissible evidence; however, there are decisions that did not agree with that view.

An arbitrator may, unless the parties have agreed otherwise, require the parties to the reference and all persons claiming through them to submit to be examined on oath or affirmation, subject to any legal objection, and administer oath to or take affirmations of the parties and witnesses. Unless the parties have agreed otherwise, the witnesses must be examined on oath or affirmation. The parties may however agree to do away with the oral evidence and base the proceedings on documentary evidence. The High Court also has the power to order that the evidence be given by affidavit.

An arbitrator may, unless the parties have agreed otherwise, require the parties to the reference and all persons claiming through them to produce all relevant documents within their possession or power, subject to any legal objection. An arbitrator cannot however order a third party to produce any documents within its possession or power. In such cases, a party to an arbitration may take out a summons to produce documents. The High Court has the power to order that a summons to produce documents be issued to any person within Malaysia.

**Damages, Interest, Costs and Taxes**

There are no any express limits on the type of damages that are available in an arbitral proceeding. However, arbitrators are likely to follow the common law principles that regulate punitive or exemplary damages.

An arbitrator generally has the same power as that of a court to award interest at such rate as he thinks fit. Unless the award directs otherwise, a sum directed to be paid by an award will carry interest as from the date of the award at the same rate as a judgment debt. The interest rate for High Court judgments is 8% per annum.

The arbitrator has the discretion to award costs. He may direct to and by whom and in what manner the costs must be paid. He may tax or settle the amount of costs to be so paid. The Act provides that any provision in an arbitration agreement, entered into before the dispute has arisen, that stipulates that any party or the parties must pay his or

their own costs is void. However, if the agreement to do so was entered into after the dispute has arisen, the issue of validity does not arise.

Whether an award is taxable in the hands of the recipient depends on whether it is compensation for loss of income or capital loss. Loss of income would be subject to tax at the usual tax rates applicable to the recipient.

**Awards**

There are no legal requirements for an award in Malaysia. However, the common practice is to have a reasoned award in writing. A written award is particularly crucial where the award has to be enforced pursuant to the New York Convention.

**Recourse against Awards**

Unless a contrary intention is expressed in the arbitration agreement, an award made by an arbitrator shall be deemed as final and binding on the parties and the persons claiming under them. In other words, an arbitrator cannot reopen or revisit the case once he has rendered a final award.

There is no appeal *per se* to the court. However, an arbitrator may make necessary amendments to his award where the award is remitted to the arbitrator by the High Court for reconsideration or where the arbitrator has to state a case for the High Court (so that some of the questions of law can be referred to the High Court for determination), or where the arbitrator corrects any clerical mistake or error arising from any accidental slip or omission in an award.

**Remission of Awards**

The High Court may remit the matters referred to for the reconsideration of the arbitrator under the Act. When an award is remitted, unless otherwise directed by the High Court, the arbitrator has to make his award within three months after the date of the order. An award will be remitted only in limited circumstances, namely the award is

*ex facie* bad, there has been misconduct on the part of the arbitrator, there has been an admitted mistake and the arbitrator has requested for it to be remitted, or where additional evidence has been acquired after the making of the award.

**Stating the Case**

An arbitrator may on his own motion or shall upon the direction of the High Court, state any question of law arising in the course of the reference or an award or any part of an award in the form of a special case for the decision of the High Court. Such statement of case may (or shall, if the High Court so direct) be made with respect to an interim award or a question arising in the course of a reference, notwithstanding that proceedings under reference are pending.

The power of the High Court to direct the arbitrator to state a special case for its decision is discretionary. For that, the plaintiff must have first asked the arbitrator to state a case for the decision of the High Court and his request must have been met with refusal (it must however be noted that the Court would not direct the arbitrator to state a case for reference merely because the arbitrator has refused to do so), and the question of law raised must be, having regard to all the circumstances of the case, determined by the High Court.

**Setting Aside of Awards**

An award may be set aside where an arbitrator misconduct himself or the proceedings. The term "misconduct" is used in its technical sense as denoting irregularity and not moral turpitude: it includes failure of an arbitrator to observe the rules of natural justice, appearance of bias or partiality; and any irregularity of action that is not consonant with the general principles of equity and good conscience. An award may also be set aside where an arbitration or award has been improperly procured.

The courts have set aside the award in instances, among others, where the award is ambiguous and uncertain, where there is an error of law on the face of the award, and where the arbitrators do not properly appraise the material evidence before them or rely

on inadmissible evidence. Any application to set aside an award has to be filed within six weeks after the award has been made and published to the parties. When faced with applications to set aside, the general approach of the Malaysian Courts is to uphold an award unless there is something radically wrong with the proceedings.

**Enforcement of Arbitral Awards**

A domestic award may, by leave of the High Court, be enforced in the same manner as a judgment or order to the same effect. Once an award is made, an application for leave to enforce the award can be refused only where there is a real ground for doubting the validity of the award, and in such cases, it is for the respondent to bring in grounds for doubting the validity of the award. Where leave is given by the High Court, judgment may be entered in terms of the award. A "domestic award" means an arbitral award made in Malaysia.

Pursuant to the New York Convention Act, foreign awards made in a Convention Country are enforceable in Malaysia by leave of the High Court in the same way as a domestic award. Where leave is obtained, the award may be enforced in the same manner as a judgment or order of the High Court. Also, where leave is given, a judgment may be entered in terms of the award. Once leave is obtained, an award becomes an order of the High Court and thereafter all modes of execution available to judgments of the High Court are similarly available to the party enforcing the arbitral award.

Both the domestic and foreign arbitral awards may be enforced summarily in reasonably clear cases. A party against whom an award was made can have recourse to the passive remedy (as opposed to active remedies such as setting aside or remission) of resisting the enforcement proceedings.

The general judicial attitude in Malaysia is to give the effect to the awards unless there are very prohibiting reasons.

**Arbitration Institution: KLRCA**

Malaysia has a well-known arbitration institution to facilitate local, regional and international arbitrations – the Kuala Lumpur Regional Centre for Arbitration or KLRCA. KLRCA has its own set of arbitration rules.

It should be noted that the choice of KLRCA produces interesting consequences. For example, section 34 of the Act *inter alia* provides that its provisions (except the enforcement provisions) do not apply to arbitrations held under the UNCITRAL or the KLRCA Rules. This would mean that the supervisory jurisdiction of the local courts, which the Act makes provisions for, is excluded where the UNCITRAL Rules or KLRCA Rules are adopted, where the procedural law is Malaysian law or where the place of arbitration is Malaysia.

A major concern of the parties conducting arbitration under the KLRCA Rules would be the inability to seek interim relief from the courts where the arbitration has commenced (under the KLRCA Rules, an arbitration is deemed to have commenced on the date on which the Notice of Arbitration is received by the respondent). It appears that the courts will not entertain a request for interim relief once the arbitration proceedings under the KLRCA Rules have commenced, leaving the parties to the arbitration proceedings without interim protection until the arbitral tribunal has been fully constituted, at which point they are limited to the relief granted by the arbitral tribunal.

This was clearly unsatisfactory and a number of ingenious attempts were made even resorting to judicial review but they all failed. However, there has recently been a change of mind in a recent decision of the Court of Appeal namely **Thye Hin Enterprises v Daimler Crysler Malaysia Sdn Bhd[36].** Here, the Appellant and the Respondent were parties to a dealership agreement. Disputes arose between them and they referred the matter to arbitration at the KLRCA. In the interim, the Appellant filed a writ followed by an application seeking an interim injunction seeking to preserve the

[36] [2005] 1 MLJ 293

status quo pending the decision of the arbitrators. The application was dismissed by the High Court Judge under Section 34. The Appellant then appealed to the Court of Appeal.

The Court of Appeal agreed that the grant of interim relief pending the outcome of an arbitration held under the KLRCA Rules is not prohibited by Section 34 of the Act. This pragmatic approach by the Court is to be lauded and the decision has at least allayed the fears of arbitrating under the KLRCA Rules.

**Arbitration Act 2005**

The Arbitration Act 2005 ("2005 Act") has resulted from a long period of gestation. There were heated debates about the form the new Act should take. Various points of view were hotly canvassed. The protectionist lobby, argued for registration and licensing of arbitrators and for a separate domestic Act modelled on the English Arbitration Act 1996. Representations were also made for the retention of the special position given to KLRCA arbitrations under Section 34 of the 1952 Act. The Malaysian Bar Council, on the other hand wanted a single Act based on the Model Law, arguing that a dual regime based on the English 1996 Act for domestic arbitrations and the Model Law for international arbitrations were illogical, confusing and against the spirit of harmonization.

The debate is now settled. The 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 systems of Malaysia, as well as to enhance the use of arbitration in Malaysia. It must be noted that under Section 51(2) and (3), of the Arbitration Act 2005, the Act does not apply to arbitral proceedings commenced before the coming into force of the Act which was the 14th of March 2006. Such arbitral proceedings will be governed by the 1952 Act.

Among the principal features of the 2005 Act is the distinction between international and domestic arbitrations. An international arbitration is defined as that where one of the parties has its place of business outside Malaysia, or where the seat of

the arbitration is outside Malaysia or where outside Malaysia the substantial part of the obligations of any commercial or other relationship is performed or the place where the subject matter of the dispute is most closely connected with. A domestic arbitration is defined as any arbitration which is not an international arbitration.

In respect of international arbitrations with Malaysia as the seat, Part III of the 2005 Act, which *inter alia* deals with consolidation of proceedings, powers of the High Court in determination of preliminary point of law and reference on questions of law arising out of an award, does not apply unless the parties agree otherwise in writing. For domestic arbitrations, Part III applies unless the parties agree otherwise. Simply put, if parties to an international arbitration want greater access to the Malaysian Courts they are free to include Part III. Conversely, parties to a domestic arbitration can curtail their right of greater access to the Courts by opting out of Part III. This "opting in" and "opting out" provision ensures that party autonomy is given due recognition.

Other features of the new 2005 Act are the reduced degree of court intervention; affording the arbitral proceedings a greater amount of flexibility and the merger of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 with the new Act.

Another new feature is the power of appointment given to the KLRCA. Where previously, in the absence of an agreed procedure, parties had to apply to the High Court in instances of default of appointment of sole arbitrator or presiding arbitrator, either party may now apply to the Director of the KLRCA to make the appointment. If the Director is unable to act or fails to act within 30 days of the request being made any party may apply to the High Court to make such an appointment. By this inclusion, the Director of the KLRCA is now given the statutory power to make appointments, which power he previously possessed only under the Rules of the KLRCA or by virtue of arbitration agreements.

While reduced degree of court intervention appears to be an overriding theme, certain provisions in the 1952 Act relating to powers of the High Court have been improved and tightened. One can only guess that this must have come about to give

statutory effect to judicial decisions. Section 6 of the 1952 Act which governed stay of court proceedings pending reference to arbitration was a discretionary power vested in the courts. The exercise of this power has now been diluted.

In the 2005 Act, the court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement must stay the proceedings and refer the parties to arbitration. The only exceptions are, if the 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 court in making the order for stay can also impose any conditions it deems fit. This in effect removes any discretionary power that is presently vested in the court, save for the exceptions stated.

The 2005 Act has also put the lid on the debate as to the power of the High Court to grant interim relief in arbitrations that are governed by the KLRCA Rules, UNCITRAL Rules 1976 and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965. Under the 1952 Act which was subsequently amended, Section 34 expressly precluded the provisions of the 1952 Act and any other written law from applying to arbitrations held under the auspices of these bodies. This often gave rise to the question whether one could turn to the courts for interim relief when needed.

This situation has now been cleared up. Firstly, in the new Act, there is no longer any distinct reference to these bodies and the special position that they occupy. Secondly, the High Court is given wide discretionary power to make any order for interim measures on an application by either party before or during the arbitration. Interestingly, in addition to the existing situations when such an order may be made, for e.g., security for costs, securing the amount in dispute, preservation, custody or sale of property, the 2005 Act also empowers the Court to make orders to ensure that any award which may be made in the "arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party". This pre-award Mareva type of interim relief is a new inclusion which would certainly ensure that a successful party does not end-up with a paper-award.

The 1952 Act provided for setting aside of awards on grounds that the arbitrator has misconducted himself in the proceedings or where an arbitration or award was improperly procured. This would normally entail situations of technical misconduct or gross procedural irregularity. The 2005 Act, however, limits the grounds for setting aside to certain specific instances, mainly procedural, for e.g. one of the parties to the arbitration agreement was under an incapacity, invalid arbitration agreement, no proper notice of appointment of arbitrator or that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement etc. To this is also added that an award may be set aside if the High Court finds that the subject matter of the dispute is not capable of settlement by arbitration under Malaysia's laws or the award is in conflict with public policy in Malaysia.

Conflict with public policy has been further defined, but not limited to, to include situations where the award was induced or affected by fraud or corruption or a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of an award. This extended definition is bound to spawn an argument whether instances that are presently pursued as technical misconduct or gross procedural irregularity would amount to a breach of the rules of natural justice, which if does, would invite an application for setting aside of the award under this head.

**Final Thoughts**

The foundation for a more robust development of ADR procedures in Malaysia is being laid down especially with the coming into effect of the Arbitration Act 2005. Nevertheless all parties concerned must do more to promote other means of ADR to the general public at large. It is worth remembering that the Asian community is much more accustomed to ADR as opposed to the western implant of adversarial style of litigation. The words of wisdom of Farley J of the Ontario Supreme Court is apt to summarize the scenario:-

"One can only hope that the litigating public and bar will recognize the benefits of resolving disputes through alternative dispute resolutions (ADR); as a judge, one is constantly amazed at how many matters can be resolved if the parties face up to the

practical problem that in many cases there be time to pay and payment must be stretched out over time. As I have said, you cannot get blood from a stone but you can get some juice from a turnip if it is squeezed the right way."