

BOOK REVIEW

Sundra Rajoo & WSW Davidson (2007), *The Arbitration Act 2005: UNCITRAL Model Law as Applied in Malaysia* (Thomson: Sweet & Maxwell Asia, Malaysia), pp. 293+xxxiv, ISBN-13: 978-983-2631-81-1

Sundra Rajoo & 'Bill' Davidson's book is a section by section brief commentary on the Arbitration Act 2005 (herein after referred to as 2005 Act) of Malaysia. Ordinarily, brief commentaries on a statute do not attract much academic interest. However, the book under review is an exception for two reasons: *first*, it is the first, and till now the only, book on the 2005 Act, which came into force on March 15, 2006; *secondly*, it is written by two of the most senior and well-known arbitrators of Malaysia who helped to draft the 2005 Act as members of the *ad hoc* committee set up by the Malaysian Bar Council to formulate a draft of the new Act. This enabled them to gain a deeper than usual insight into and understanding of each and every of 51 sections of the 2005 Act. This expertise they have used in writing this book and made it worthy of attention.

Arbitration is said to be as old as the human society itself. Phoenician traders used it, so also Romans, Greeks and Muslims. Historically it was based on customary trade practices and traditions, un-regulated by law or courts. The (English) Arbitration Act 1697 carries the dubious distinction of being the first enactment that brought legal intervention to the otherwise private proceeding. The principle of 'party autonomy' was further eroded by the (English) Arbitration Act 1889 (as amended in 1934) and the Arbitration Act 1950 (as amended in 1979) and then the wholesale revision of the law through the Arbitration Act 1995, which reflect the traces of the United Nations Commission on International Trade Law (UNCITRAL) Model Law.

In Malaysia, the history of arbitration legislation started with the Arbitration Ordinance XIII of 1809 of the Straits Settlements comprising of Singapore, Malacca and Penang. At that time, the area was governed from India. This Ordinance was replaced by the Arbitration Ordinance 1890, which was replaced by the Arbitration Ordinance 1950 of the Federation of Malaya. Both of these two Ordinances were based on the (English) Arbitration Act 1889. The Sarawak Ordinance No. 5 of 1952, which was based on the (English) Arbitration Act 1950 was extended to the whole of Malaysia in 1972 and came to be known as the Arbitration Act 1952 (Act 93) (herein after referred to as 1952 Act).

Whereas in England the law of arbitration continued to be amended and updated, Malaysia was not that fortunate in this respect. The law of arbitration remained frozen in the form of the English Law of 1950 till the enactment of the Arbitration Act 2005. Thus, for nearly half a century, an outdated law remained in force in Malaysia, during which time not only in England but also in the neighboring countries the corresponding laws were updated and modernized.

The 2005 Act represents a departure from the previous practice of wholesale adoption of English laws of arbitration, lock, stock and barrel. For a change it now heavily relies on UNICITRAL Model Law, and New Zealand Arbitration Act 1996, which prescribe a unified law for both domestic and international arbitration.

This lucidly written book of 293 pages is a strong refutation of the allegation that law books are excessively bulky, overloaded with thousands of foot-notes and an 'elephantine laboriousness' oozes out of their every page, making them so difficult to read. The book under review is slim, highly readable, affordable (RM 180) and beautiful in its bluish-black-burnt-amber hardcover. A poetic elegance is added to it by the Foreword written by Dato' Mahadev Shanker, who starts with a quote from the *Rubai'iyat* of Omar Khayyam and goes on to highlight the importance of the book in these words:

"As the authors of this work (Sundra & Davidson) will now find their names recorded in the sands of time. (B)oth...were actively involved in the process of the formulation of the new Act line by line. This gives them a unique claim to be regarded as specialist authors of this work. Malaysia and everyone in any way concerned with arbitration here owes them an irredeemable debt for sharing their expertise with us...Since the new Act represents

a regime change in the Malaysian law of arbitration and this book is the first and only exposition of the Act, I venture to state that it will be a very bold practitioner who would dare venture into the field of arbitration in Malaysia without this book at his elbow.”

Coming within few months of the enactment and coming into force of the 2005 Act, the book provides a commentary on the provisions of the Act, giving brief background information's, relevant case law and some pointers to the changes introduced by the Act. The writing style is direct and lucid. There is not a single footnote in the entire book; citations are given within the text itself. A total of only 245 cases are cited in the book, taken mainly from five jurisdictions: Malaysia, New Zealand, Australia, U.K. and India. The job of selecting these few cases should have posed for the authors a problem not in any way less exacting than selecting the finalist in a beauty contest.

The book contains the usual Table of cases, Table of Statutes, a “List of Publications” (bibliography) and a detailed index. There are also two Appendices: one containing the text of the UNICITRAL Model Law, along with the explanatory notes by the UNICITRAL secretariat and the other has the text of the ‘New York Convention,’ that is, Convention on the Recognition and Enforcement of Foreign Arbitral Award 1958. It is indeed useful to have these texts in the book as many of the provisions of the 2005 Act are either directly or indirectly based on these.

As the 2005 Act is very new, there is no case law as yet on its provisions, making it difficult to make comments. The authors were thus forced to take the help of case law from New Zealand, U.K., India and Australia. Out of the 245 cases cited in the book, only 19 are Malaysian. The number of local cases would not have been so few if the authors showed a little more accommodation.

The book contains a good description and discussion of some of the important provisions of the 2005 Act. For instance, while discussing the extent of judicial intervention in arbitration allowed by the Act, the authors have identified thirteen situations, and by listing sections 10, 11, 13(7), 15(3), 18(8), 29, 37, 41, 42, 44(1), 44(4), 45 and 46, they made the task of readers easy. They have also pointed out that the question whether courts do possess inherent jurisdiction to intervene in arbitration matters, has been answered differently by the Malaysian courts, thus keeping this issue in a state of un-certainty. Relevant cases have been cited in

support of their contention. Commenting on section 11 and 19 which deal with interim measures granted by the High Court and arbitral tribunal respectively, they rightly comment: “(T)he question often arises as to whether an interim order should be sought from the court or the arbitral tribunal. The Act does not lay down any guidelines in this respect, but recent case law which reflects a less interventionist approach make it clear that these powers of the court should always be used to support and not to stifle the arbitral process” (p. 54).

Similarly, the authors have explained very well a novel feature of the 2005 Act. Section 3 gives liberty to the parties to either ‘opt in’ or ‘opt out’ of either the whole or a part of part III of the Act. Part III has seven sections (40-46) in it. In case of domestic arbitration, where the seat of arbitration is in Malaysia, Part III *shall apply* unless the parties agree otherwise in writing (i.e. opt out). In respect of international arbitration, where the seat of arbitration is in Malaysia, Part III *shall not apply* unless the parties agree otherwise in writing (i.e. opt in). The authors rightly comment (p. 21) that “the section is silent as to when an ‘opting in’ and ‘opting out’ can take place.” They further say that “one of the grey areas left in section 3 is the extent to which the Act will apply to arbitrations where the seat of arbitration is not in Malaysia.

Another novel feature of the 2005 Act which is well commented upon in the book is section 18, which now empowers an arbitral tribunal to rule on its own jurisdiction. The 1952 Act contained no such provision, as Common Law did not approve of this idea. The new Act not only authorizes an arbitrator to so do, but also checks the courts to determine this issue before the arbitrator has done so (pp. 85-87).

An issue well discussed in the book is reference to the High Court any ‘question of law’ arising out of an award as provided in section 42 of the Act. This provision is known to be the source of much litigation in arbitration. It was there in the 1952 Act as well as in the arbitration laws of the Common law countries, and was used as a convenient means for delaying the enforcement of arbitral awards. Since it is neither contained in the UNICITRAL Model Law nor in recent legislations in parallel jurisdictions, it was widely believed that the concept would not find a place in the 2005 Act. But, alas, this potential minefield of litigation has been retained in the new Act. The only consolation it provides lies in the fact that section 42 is in Part III, from which the parties may ‘opt out’, in case of domestic arbitration, and since international arbitration is not governed by Part III unless the parties ‘opt in,’ there may not be any

problem unless parties opt for it. However, ideally, section 42 should not be there if the 2005 Act is said to follow the UNICITRAL Model Law.

Some of the other well discussed issues in the book are: appointment of arbitrators (pp. 61-67), and procedure for challenging their appointment (pp. 73-77); form and contents of award (pp. 147-155); grounds for refusing recognition and enforcement of award (pp. 184-191); and cost and expenses of arbitration (pp. 206-214).

As there is no foot-note in the whole book, references and citations are embedded in the text itself. 'List of Publications' which apparently stands for bibliography contains a list of only seventeen (17) books and no periodical material or other sources. Coupled with a very small number of cases, the book may fall short of the expectations of professionals, researchers and lawyers. We look forward to its second edition which may contain more cases and other materials.

When authors of the stature of Sundra Rajoo and 'Bill' Davidson write a book, expectations of the readers tend to rise. Notwithstanding the rush in which the book is written, there are things which one may still desire to be there. For instance, an introduction, more detailed than the present one, might have given a fuller account of all the defects with which the Arbitration Act 1952 suffered, and to what extent the new Act succeeded in rectifying them. Similarly, as is well known, the new Act took many years to come. During that long period, several draft bills prepared by various bodies in Malaysia, such as the Malaysian Bar Council, were in circulation and vigorously debated. In his Foreword to the book, Dato' Mahadev Shankar has touched upon the matter of intense controversy generated by these bills and says: "the passion with which each disparate group pursued its objectives often resulted in confrontational tirades which had of necessity to be directed to the Attorney General as the final arbiter of the draft legislations to be submitted to the Parliament. In the midst of clamour and competing drafts from the various factions, the task of the Attorney General...could not have been an easy one.... Over a period of seven years from 1999 when the great debate began, every point in the competing draft legislations put forward by each faction was ferociously scrutinized by the others and the Bar Council draft inevitably came in for a lot of flak." However, the book makes no reference to this "great debate" or gives even in brief, a comparative evaluation of these drafts. As 'insiders' they were in a unique position to undertake this task for the benefit of future generations of arbitrators, and as a help in the formulation of future amendments to the Act.

A major change brought about by the new Act, which deserved a mention in the book, is the abandonment of the concept of total delocalization contained in section 34 of the 1952 Act. According to this section, all arbitrations conducted, *inter alia*, under the Rules of the Kuala Lumpur Regional Center for Arbitration (KLRCA) shall be exempt from any judicial intervention or scrutiny. Section 34 was inserted in the 1952 Act in 1980 through an amendment with much fan fare. Its total rejection and non-inclusion in the 2005 Act depicts a major policy shift. The special status enjoyed by the KLRCA for more than twenty five years stands withdrawn with the demise of section 34. Absence of any comment in the book on this major happening and its effect, if any, on the international commercial arbitrations conducted in Malaysia, appears odd and surprising.

Similarly, no mention is made in the book of the abandonment of the concept of “umpire,” which was a prominent feature of the 1952 Act. These and similar other things, like rejection of the concept of “misconduct” of arbitrators, may appear trite to the authors, but surely it may not be so for many of the readers. Many judicial decisions of the past fifty plus years relating to the 1952 Act could have found a place in the book as quite many are still relevant. The authors presumably omitted them for the sake of brevity, an objective followed by them with unwavering conviction. By over-stretching the maxim – ‘brevity is the beauty of law’ - things got a little less beautiful.

On the whole, the book is a valuable contribution and a welcome addition to the scant literature on the law of arbitration in Malaysia. The book will surely be welcomed by lawyers, students and arbitrators, all of whom will eagerly look forward to its second edition which, as the authors have promised, would contain more cases and material.

The book is beautifully produced and neatly printed. It is free from printing mistakes, except one, and that too on its very first page. The Sarawak Ordinance No 5 of 1952 is wrongly printed as “of 1982.” The authors deserve praise for producing this book in a record less than six months time from coming into force of the new Act, and Sweet & Maxwell Asia for publishing it so nicely and quickly.

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