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## **Aspects of Content and Language in the Malaysian Arbitration Act**

### **Abstract**

This paper focusses on the Malaysian Arbitration Act of 1952 and examines some aspects of content in the Act as compared to that in the model Law. Some linguistic analysis is carried out and differences in terms of specificity and lack of adequate specification and differences in legal systems and procedures are discussed. The analysis shows that content and language are influenced by national requirements and concerns, culture, legal system and other constraints.

### **1. Introduction**

A dispute can be settled either by access to the courts or by way of alternative resolution mechanisms. Arbitration is one of the alternative resolution mechanisms that are available in Malaysia. Arbitration has become more popular where commercial disputes are concerned due mainly to the efforts of the United Nations Commission on International Trade Law (UNCITRAL) and the Model Law on International Commercial Arbitration (the Model Law). Another reason is that it is the oldest dispute mechanism and is influenced by litigation processes, but without the problems associated with litigation. In addition, it is the only alternative dispute resolution mechanism that provides a mechanism for the enforcement of awards. Lastly, the choice of arbitration is the parties and can be considered to be within the control of the parties (Xavier 2001: 2).

Arbitration originated from the desire of people who wanted their disputes to be resolved by their peers and not by an impartial third party. Today, arbitration is often presided over by retired judges and lawyers

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and can be considered more complex and legalistic than what it was meant to be.

This paper will examine the discourse of the Malaysian Arbitration Act (MAA) as constructed and used in Malaysia. It will compare some aspects of the Act with that of the Model Law (ML), such as the definitions given, the role of the High Court, the composition of the arbitral tribunal and the degree of specificity or lack of specificity in the MAA as compared to the ML. The structure of the MAA will be given as will the effects of the lexico-grammatical features in the Act, particularly with regard to all-inclusiveness and precision.

## **2. Legal Genres**

Research on legal discourse has focused on legal discourse in professional and academic settings. Bhatia (1993), for example, analysed two genres: legislation and cases using genre analysis. He examined the syntactic properties and cognitive structuring of legislative provisions and the structure of legal cases and found a number of features of legislations that make the document highly specific and all-inclusive. Badger (2003) did a genre analysis of newspaper law reports and offers a description which links language to the context of culture and explains how the lexico-grammar and text structure may lead to the identification of the *ratio decidendi*. Feak et al. (2000) carried out an analysis of published student-written legal research papers which can be used as a model for the teaching of seminar paper writing. Issues that arise from some contradictory demands found in the Joint Declaration of the Government of the United Kingdom and the Government of the People's Republic of China on the question of Hong Kong have been discussed by Bhatia (2000), and the problem of correct legal interpretation of a standard sales contract used in the buying and selling of property in Denmark has been examined by Norlyk (2000).

## **3. Data and Methodology**

The data in the study is the **Malaysian Arbitration Act 1952**. The provisions of the Act govern every arbitration agreement made under any written law passed before and after the commencement of the Act. It does not apply to arbitration held under the United Nations Commission on International Trade Arbitration Rules 1976 and the

Rules of the Regional Centre for Arbitration in Kuala Lumpur, except in certain cases.

The Malaysian Arbitration Act has 34 sections and several subsections under 8 headings. The headings are:

1. Preliminary
2. Effects of Arbitration Agreement, etc.
3. Arbitrators and Umpires
4. Conduct of Proceedings, Witnesses, etc.
5. Provisions as to Awards
6. Costs, Fees and Interest
7. Special Cases, Remission and Setting Aside of Awards, etc.
8. Enforcement of Award

A genre analysis of the Act includes the communicative purpose of the text, the move structures and the rhetorical features employed in constructing the text. In the analysis, the Act is divided into sub-genres, moves and sub-moves. The Arbitration Act is considered a genre and the sections within it are referred to as sub-genres. Identification of the prototypical elements involved, their sequencing and the realizations of each element are given.

Swales (1990) categorises genres according to their set of shared communicative purposes. The purpose of each section or sub-genre is recognized by the expert members of the legal discourse community and therefore constitutes the rationale for the labelled sub-genres in the analysis. The sub-genres can also be referred to as the primary rhetorical functions in the Act and the secondary functions are the moves. In various studies on genre analysis, the label 'move' has been used but not clearly defined. The extent of a move appears to differ between analyses of introduction sections and those of discussions sections. Swales' (1990) three move introduction section consists of: establish a territory, establish a niche and occupy the niche. The moves in discussion sections give functions such as 'statement of results' and 'hypothesis' (Dubois 1997; Hopkins and Dudley-Evans 1988). Move classifications have been determined by sentence boundaries (Crookes 1986), lexico-grammatical units (Hopkins and Dudley-Evans 1988; Peng 1987; McKinlay 1982), semantic units (Swales 1990) and independent clauses (Dubois 1997). In this study the breakdown of the

sub-genres into moves has been based on the consideration of moves as semantic units related to the writer's purpose. The micro rhetorical functions have been labeled sub-moves in the analysis.

The basic criterion for the different units is communicative purpose which can be mapped onto one clause or several clauses or even several sentences. In this analysis, the minimal constituent that realizes a communicative purpose is a sub-move while a move is composed of one or more sub-moves. The linguistic features found in the generic structures are discussed in terms of how they serve to fulfil the rhetorical aims of the writer and how they are meant to affect the reader.

In the analysis of the language of the Act, the terms given by Bhatia (1993) are used. I shall give a brief explanation of each of these features as they will be used in the analysis of data.

**Nominal character:**

Nominals can be noun clauses, phrases or nouns which are used, often quite lengthy, to include all the necessary information in the nominal.

E.g. *The authority of an arbitrator or umpire appointed by or by virtue of an arbitration agreement*

**Complex prepositional phrases:**

The structure of a complex prepositional phrase has been given as P-N-P (Preposition+ Noun+ Preposition). Examples given by Bhatia (1993: 107) are *for the purpose of*, *in respect of*, *in accordance with* and *in pursuance of*.

**Binomial and multinomial expressions:**

Binomial and multinomial expressions refer to 'a sequence of two or more words or phrases belonging to the same grammatical category which have some semantic relationship and are joined by some syntactic device such as 'and' or 'or' (Bhatia, 1993:108). Examples are '*signed and delivered*', '*unless and until*' and '*within Malaysia or elsewhere*'.

**Initial case descriptions:**

Often the legal subject is delayed by an initial case description in the form of an adverbial clause beginning with 'where', 'if' or 'when'.

*Where it is provided by a term in a contract to which a bankrupt is a party that any differences arising thereout or in connection therewith shall be referred to arbitration, the said term shall, if the person having jurisdiction to administer the property of the bankrupt adopts the contract, be enforceable by or against him so far as relates to any such differences.*

### **Qualifications:**

Qualifications are often inserted into syntactic boundaries making the provisions extremely restricted. Example:

Unless a contrary intention is expressed therein, every arbitration agreement shall, *if no other mode of reference is provided*, be deemed to include a provision that the reference shall be to a single arbitrator.

### **Syntactic discontinuities:**

When a qualification is inserted within the syntax of a legislative sentence right next to the word or phrase that it qualifies, this creates a syntactic discontinuity. This is illustrated in the above example, '*shall... ..be deemed to include*' where the insertion of the qualification leads to a discontinuous verb phrase.

## **4. The Structure of the Malaysian Arbitration Act**

The structure of the Act can be given as follows:

### Sub-genre: Preliminary

Move 1 Title of Act

Move 2 Interpretation of the Act/definition of rules

Sub-move 1 Definition of 'arbitration agreement'

Sub-move 2 Definition of 'commencement of this Act'

Sub-move 3 Definition of 'High Court'

Sub-genre: Effect of Arbitration Agreement, etc.

Move 1 Authority of arbitrators and umpires to be irrevocable

Move 2 Death of a party

Sub-move 1 Arbitration agreement not discharged by death of any party

Sub-move 2 Authority of arbitrator not revoked by death of any party

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Sub-move 3 Sections no effect on the operation of any written law

Move 3 Bankruptcy

Sub-move 1 Term in contract enforceable against the bankrupt

Sub-move 2 Any other person to the agreement may apply to the High Court for an order

Move 4 Power to stay proceedings where there is no submission to arbitration

Move 5 Reference of interpleader issues to arbitration

Sub-genre: Arbitrators and Umpires

Move 1 When reference is to a single arbitrator

Move 2 Power of parties in certain cases to supply vacancy

Sub-move 1 Appointment of a new arbitrator in certain cases

Sub-move 2 Appointment of sole arbitrator

Move 3 Umpires

Sub-move 1 Provision that two arbitrators shall appoint an umpire

Sub-move 2 Umpire may enter in lieu of the arbitrators

Sub-move 3 High Court may order that the umpire enter in lieu of the arbitrators

Move 4 Agreement for reference to three arbitrators

Sub-move 1 Appointment of an umpire

Sub-move 2 Award of any two of the arbitrators to be binding

Move 5 Power of High Court in certain cases to appoint an arbitrator or umpire

Sub-move 1 Appointment of arbitrator if parties do not concur in the appointment of an arbitrator

Sub-move 2 Appointment of arbitrator if appointed arbitrator is unable to act

Sub-move 3 Appointment of arbitrator when two arbitrators do not appoint the third

Sub-move 4 Appointment of arbitrator when third arbitrator is unable to act

Sub-genre: Conduct of Proceedings, Witnesses, etc.

Move 1 Conduct of proceedings, witnesses, etc.

Sub-move 1 Provision in agreement for parties to submit to be examined by arbitrator

Sub-move 2 Provision in agreement for witnesses to be examined on oath or affirmation

Sub-move 3 Power of arbitrator to administer oaths

Sub-move 4 Summons to give evidence or produce documents

Sub-move 5 High Court issue to bring up prisoner before arbitrator

Sub-move 6 Power of the High Court

Sub-genre: Provisions as to Awards

Move 1 Time for making award

Sub-move 1 Power of arbitrator to make an award

Sub-move 2 Order of the High Court to enlarge time

Sub-move 3 Removal of arbitrator by the High Court

Move 2 Interim awards

Move 3 Specific Performance

Move 4 Awards to be final

Move 5 Power to correct slips

Sub-genre: Costs, Fees and Interest

Move 1 Costs

Sub-move 1 Provision in agreement that the costs shall be in the discretion of the arbitrator

Sub-move 2 Costs taxable in the High Court

Sub-move 3 Provision in agreement that parties pay their own costs

Sub-move 4 Application to the arbitrator for an order on payment

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Move 2 Taxation of arbitrator's or umpire's fees

Sub-move 1 Order of the High Court that the arbitrator shall deliver the award

Sub-move 2 Application for the purposes of this section

Sub-move 3 Review of taxation fees

Sub-move 4 Entitlement of the arbitrator to appear on any taxation review

Move 3 Interest on awards

Sub-genre: Special Cases, Remission and Setting Aside of Awards, etc.

Move 1 Statement of case

Sub-move 1 Statement of question of law or award by arbitrator

Sub-move 2 Special case with respect to an interim award

Sub-move 3 Decision of the High Court deemed to be judgement of the High Court

Move 2 Power to remit award

Sub-move 1 Remittance of matters by High Court to arbitrator

Sub-move 2 Award to be made within three months by arbitrator

Move 3 Removal of arbitrator and setting aside of award

Sub-move 1 Removal of arbitrator who has misconducted himself by High Court

Sub-move 2 Setting aside of award by High Court when arbitrator has misconducted himself

Sub-move 3 Order by High Court that money payable shall be brought to court

Move 4 Power of High Court to give relief where arbitrator is not impartial or the dispute involves question of fraud

Sub-move 1 Application of a party to revoke authority of impartial arbitrator

Sub-move 2 Power of High Court to revoke authority of arbitrator

Sub-move 3 Refusal of high Court to stay an action



Move 5 Power of High Court where arbitrator is removed or authority of arbitrator is revoked.

Sub-move 1 Appointment of a person to act as arbitrator by High Court

Sub-move 2 Appointment of a person by High Court to act as arbitrator in place of the arbitrator who has been removed

Sub-move 3 Power of appointed person

Sub-move 4 Order of High Court that provision regarding award ceases to have effect

Sub-genre: Enforcement of Award

Move 1 Enforcement of award

Move 2 Power of High Court to extend time for commencing arbitration proceedings

Move 3 Terms as to costs, etc.

Move 4 Government to be bound

Move 5 Rules of court

Move 6 Application of Act to statutory arbitrations

Move 7 Application of Act

Move 8 Act not to apply to certain arbitrations

Sub-move 1 Non application of this act to certain arbitration

Sub-move 2 Enforcement proceedings of award in accordance with certain Conventions or Rules

Sub-move 3 High Court the competent court for such enforcement

**5. Communicative Purpose**

MAA is intended to regulate the conduct of arbitration in Malaysia in general although there are other statutes which provide for certain disputes referred to arbitration. The Act applies to every arbitration under any written law. The scope is further provided in Section 34 which states

that the Act does not apply to arbitration held under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration at Kuala Lumpur.

## **6. Aspects of Content of the Malaysian Arbitration Act**

Some of the differences in the presented content of the Malaysian Arbitration Act as compared to the Model Law are discussed in this section. For example, the definitions found in the Acts, and the composition of the arbitral tribunal. Also, the concept of Umpire, which is not found in the Model Law, and the conditions specified for failure of the arbitrator to act, which are rather detailed in the Malaysian Arbitration Act, will be founded upon.

### Definitions

In Article 2 of ML, three definitions are given to explain: arbitration, arbitral tribunal and court together with rules of interpretation.

- (a) “arbitration” means any arbitration whether or not administered by a permanent arbitral institution;
- (b) “arbitral tribunal” means a sole arbitrator or a panel of arbitrators;
- (c) “court” means a body or organ of the judicial system of a State;

Precise means by which written communications are to be sent and received are provided in ML. ‘Receipt of written communication’ in Article 3 is deemed to have taken place ‘if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address ... if it is sent to the addressee’s last-known place of business, habitual residence or mailing address by registered letter or any other means which provide a record of the attempt to deliver it ... the communication is deemed to have been received on the day it is so delivered’. Precise means of communication is not found in MAA.

In MAA, ‘arbitration’ is not defined and neither is ‘arbitral tribunal’. There are two sections, ‘short title’ and ‘interpretation’ in the first part called ‘Preliminary’. The first cites the name of the Act which is the Arbitration Act, 1952, and the second, ‘Interpretation’, provides defini-

tions for ‘arbitration agreement’, and ‘commencement of this Act’ and ‘High Court’. The definitions are as follows:

- “arbitration agreement” means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not;
- “commencement of this Act” in respect of Sarawak means the 18<sup>th</sup> June, 1952, and in respect of the other States the 1<sup>st</sup> November, 1972;
- “High Court” means the High Court in Malaysia or the High Court in Borneo, as the case may require.

The definition of an arbitration agreement in the MAA is rather general as compared to that in ML. There is no specific form of an arbitration agreement given. What is specified clearly is that it should be in writing, which means that an oral agreement is not valid. However, there are no specifications of what a written agreement means. There is no mention that the agreement be signed by the parties concerned, indicating that signing of the agreement is not a condition for validity. This implies that the arbitration clause may be found in a document that is not signed by one of the parties. It will, nevertheless, be valid and binding on the parties involved.

‘Commencement of this Act’ is provided since there exist two different times for this – 1952 for Sarawak and 1972 for the other states in Malaysia. A look at history reveals that prior to 1972, when the current Act was implemented for the whole of Malaysia, there existed different arbitration laws in the different states. In Johore, the statute in force was Arbitration Enactment No. 43 and in Kedah it was Enactment No. 6 (Arbitration in Sarawak, Ordinance No. 5 of 1952 was in force starting from 18<sup>th</sup> of June 1952 and has remained since. Sabah had its own law for arbitration proceedings. By 1972, the Ordinance of 1952, already governing arbitration proceedings in Sarawak, and revised by the laws of Malaysia Act, No. 93, was introduced in all the States other than Sarawak.

‘High Court’ is defined in MAA due to the local system which has two courts, in Malaysia and Borneo. The High Court in Malaysia has a range of powers under the Arbitration Act of 1952 involving different aspects of arbitration.

### Composition of Arbitral Tribunal

With regard to the composition of the Arbitral Tribunal, both ML and MAA give the number of arbitrators allowed, explain who may be an arbitrator and outline the procedures that have to be followed in appointing and substituting arbitrators.

In ML, article 10 provides that the parties are free to determine the number of arbitrators and that failing such determination, the number shall be three. On the other hand, in the MAA, Section 8 states that ‘unless a contrary intention is expressed therein, every arbitration agreement shall, if no other mode of reference is provided, be deemed to include a provision that the reference shall be to a single arbitrator’.

Sections 8 to 12 of MAA provide details of the appointment of arbitrators and umpires. The provisions show that the parties are given the liberty to decide on the mode of appointment of arbitrators and umpires. However, when the arbitration agreement is lacking in certain respects, the statutory provisions intervene to provide the necessary input. Section 8 states that ‘every arbitration agreement, shall, if no other mode of reference is provided, be deemed to include a provision that the reference shall be to a single arbitrator’.

The parties under MAA may choose to appoint two arbitrators, one to be appointed by each party. According to Section 10, where reference is to two arbitrators, the two arbitrators shall appoint an umpire as soon as they themselves have been appointed. The number of arbitrators allowed under MAA is one to three. Included are also conditions specifying when a third arbitrator is allowed and when an alternative arbitrator is to be appointed. Section 11(1) states that the third person to be appointed is an umpire and not another arbitrator.

Section 3 provides that the authority of an arbitrator or an umpire appointed by the parties to an arbitration agreement is irrevocable. This authority can only be revoked with consent of the High Court.

Concerning who may be arbitrators, in ML, it is stated that nationality does not affect a person's chances of appointment and that the parties are free to agree on a procedure of appointing arbitrators. Nationality is not mentioned in MAA. In fact, in MAA, the qualifications required for a person to be appointed are not included. The parties are free to decide on a person of their choice to be appointed as an arbitrator.

Section 9 of MAA provides for power of parties to supply vacancy in certain cases. If reference is made to two arbitrators, one to be appointed by each party, in the event that either of the arbitrators is refusing to act, or is incapable of acting, or dies, the party who appointed him may appoint an arbitrator for twenty-one clear days of notice received from the party who has appointed the arbitrator. In the event of default on the part of the first mentioned party, the party who has appointed an arbitrator may appoint that arbitrator to act as the sole arbitrator. It is subject to the power of the High Court to set aside the appointment of the arbitrator in pursuance of this section.

In general, the High Court has the powers with regard to certain issues in connection with arbitrators and umpires. The powers include the appointment of arbitrators and umpires (Sections 9-12), revocation of their authority (Section 3), appointment of a substitute arbitrator (Section 26), provision for extension of time for making an award (Section 14).

In MAA, it is provided that the parties can have three arbitrators. However, Section 11 (1) states that if the arbitration agreement provides that of the three arbitrators, two are appointed one each by the parties, the third is to be appointed by the two arbitrators. The third person to be appointed is the umpire and not another arbitrator.

Conditions specifying when the High Court can intervene in the appointment of an arbitrator or umpire are provided in Section 12 of MAA. The conditions in MAA are more detailed than that in ML (Article 11(4)), indicating the influence of the Courts on the arbitration system in Malaysia.

ML contains the sections on 'grounds for challenge' and 'challenge procedure' stating that an arbitrator may be challenged if there are justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. MAA does not have this provision. In fact, it is not stated that any particular qualifications are required for a person to be appointed as an arbitrator.

## **7. Aspects of Language in the MAA**

In this section, the powers of the High Court in the different aspects of arbitration will be focused on. The High Court has a wide range of powers under the Arbitration Act of 1952. From an examination of

the Act, it can be observed that the discretionary powers of the High Court are referred to the most in matters pertaining to the stay of court proceedings where there is an arbitration agreement between the parties to an action to enable a dispute to be referred to arbitration.

The High Court has powers with regard to the appointment of arbitrators and umpires, revocation of their authority, to grant extension of time for the making of an award by the arbitrator, to enforce, remit back to the arbitrator or to set aside an award under certain circumstances, to give relief where the arbitrator is not impartial or when the dispute between the parties involves a question of fraud, to make orders in respect of costs, fees and interest in arbitration matters. Almost all of the powers of the High Court are discretionary as an analysis of the language will show.

Section 6 Power to stay proceedings where there is submission to arbitration.

If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Section 6 of the Act enables the High Court to grant stay of all proceedings before it in any action initiated by a party to arbitration on an application by a party seeking to have the dispute resolved through arbitration. The word *may* shows that despite all the stated conditions being satisfied, the power is still with the High Court to order a stay of all proceedings before it is a matter of discretion.

The following requirements of section 6 must be satisfactorily met for the court to decide whether to grant or refuse the application:

1. there was an agreement between the parties and the agreement contained an arbitration clause;

2. that the applicant had not taken any other steps in the proceedings;
3. there must be sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and
4. that the applicant was at the time when the proceedings were commenced still ready and willing to do all things necessary to the proper conduct of the arbitration.

The requirements are given as qualifications in the form of adverbial phrases and may cause a syntactic discontinuity:

in respect of any matter agreed to be referred to arbitration  
before taking any steps in the proceedings  
if satisfied that there is no sufficient reason why the matter should not  
be referred in accordance with the arbitration agreement,....proper  
conduct of the arbitration

The language of section 6 places the burden on the plaintiff to show that the dispute ought not to be referred to arbitration. The adverbial phrase ‘in respect of any matter agreed to be referred to arbitration’ shows that there must be a dispute that falls within an arbitration clause before any question of stay can arise.

Section 12 Power of High Court in certain cases to appoint an arbitrator or umpire.

In any of the following cases:

- (a) where an arbitration agreement provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;
- (b) if an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy;
- (c) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him, or where two arbitrators are required to appoint an umpire and do not appoint him;
- (d) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy,

any party may serve the other parties or the arbitrators, as the case may be, with written notice to appoint or, as the case may be, concur in appointing, an arbitrator, umpire or third arbitrator, and if the appointment is not made within twenty-one clear days after the service of the notice, the High Court may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

The Move 'Power of the High Court in certain cases to appoint an arbitrator or umpire' has four sub-moves.

- Sub-move 1 All parties do not concur in the appointment of an arbitrator
- Sub-move 2 Parties do not supply vacancy when arbitrator is incapable of acting
- Sub-move 3 Parties do not appoint an umpire or third arbitrator
- Sub-move 4 Appointed umpire or third arbitrator is incapable of acting

In this move, contingencies whereby the High Court has the power to appoint an arbitrator or umpire are provided. Each of the contingencies in sub-moves 1-4 are given as initial case descriptions with binomial and multinomial expressions that make them all-inclusive and precise.

Section 13 has several references to the powers of the High Court.

Section 13 Conduct of proceedings, witnesses, etc.

- (1) Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrator or umpire on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrator or umpire all documents within their possession or power respectively which may be required or called for, and do all other things which, during the proceedings on the reference, the arbitrator or umpire may require.
- (2) Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the witnesses on the reference shall, if the arbitrator or umpire thinks fit, be examined on oath or affirmation.



- (3) An arbitrator or umpire shall, unless a contrary intention is expressed in the arbitration agreement, have power to administer oaths to, or take the affirmations of, the parties to, and witnesses on, a reference under the agreement.
- (4) Any party to a reference under an arbitration agreement may take out a summons to give evidence or to produce documents, but no person shall be compelled under any such summons to produce any document which he could not be compelled to produce on the trial of an action, and the High Court may order that a summons to give evidence or produce documents shall issue to compel the attendance before an arbitrator or umpire of a witness wherever he may be within Malaysia.
- (5) The High Court may also issue an order to bring up a prisoner for examination before any arbitrator or umpire.
- (6) The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of-
  - (a) security of costs;
  - (b) discovery of documents and interrogatories;
  - (c) the giving of evidence by affidavit;
  - (d) examination on oath of any witness before an officer of the High Court or any other person, and the issue of a commission or request for the examination of a witness out of the jurisdiction;
  - (e) the preservation, interim custody or sale of any goods which are the subject matter of the reference;
  - (f) securing the amount in dispute in the reference;
  - (g) the detention, preservation or inspection of any property or thing which is the subject of the reference, or as to which any question may arise therein, and authorizing for any of the purposes aforesaid any persons to enter upon or into any land or building in the possession of any party to the reference, or authorizing any samples to be taken or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; and
  - (h) interim injunctions or the appointment of a receiver,

as it has for the purpose of and in relation to an action or matter in the High Court:

Provided that nothing in this subsection shall be taken to prejudice any power which may be vested in an arbitrator or umpire of making orders with respect to any of the matters aforesaid.

This move has 6 sub-moves with 4-6 referring to the powers of the High Court:

- Move 1: Conduct of proceedings, witnesses, etc.
- Sub-move 1 Parties to submit to be examined by the arbitrator or umpire and produce documents required
  - Sub-move 2 Witnesses to be examined on oath or affirmation if arbitrator or umpire thinks fit
  - Sub-move 3 Power of arbitrator or umpire to administer oaths to, or to take the affirmations of parties and witnesses
  - Sub-move 4 High Court order to compel attendance before arbitrator or umpire
  - Sub-move 5 High Court order to bring a prisoner for examination before an arbitrator or umpire
  - Sub-move 6 High Court order in respect for costs, discovery of documents and interrogatories, the giving of evidence of affidavit, examination of oaths and others

Sub-move 1 states the power of the arbitrator to examine the parties in an arbitration agreement and to request for documents that are required in the arbitration proceedings. It begins with an adverbial clause *Unless a contrary intention is expressed therein* and qualifications inserted within the verb phrases *every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain..., shall, subject to any legal objection, submit to be examined, shall, subject as aforesaid, produce before the arbitrator* restrict the extent of the power of the arbitrator or umpire. The extent of the power is not clearly stated as it provides that the parties must also *do all other things which, during the proceedings on the reference, the arbitrator or umpire may require.*

Another device found is the use of binomial expressions: *arbitrator or umpire, an oath or affirmation, within their possession or power, which may be required or called for.*

Sub-move 2 states that every arbitration agreement shall also be deemed to contain a provision that the witnesses on the references shall be examined on oath or affirmation if the arbitrator or umpire thinks fit. It begins with an adverbial clause *Unless a contrary intention is expressed therein* and qualifications inserted within verb phrases *shall, if the arbi-*

*trator or umpires thinks fit, be examined on oath or affirmation.* It also contains the binomial expression: *arbitrator or umpire, on oath or affirmation.*

In sub-move 3, unless a contrary intention is expressed in the arbitration agreement, the arbitrator or umpire has the power to administer oaths to, or take the affirmations of, the parties to, and witnesses on, a reference under the agreement. There is a qualification inserted within the verb phrase, restricting the power of the arbitrator or umpire, *shall, unless a contrary intention is expressed in the arbitration agreement, have power to administer...*

Sub-moves 4-6 deal specifically with the powers of the High Court in relation to the conduct of the arbitration proceedings and its power to deliver certain orders.

Sub-move 4 provides that a party to a reference may take out a summons to give evidence or to produce document, but that no person shall be compelled under any such summons to produce any document which he could not be compelled to produce on the trial of an action. However, the High Court may order that a summons to give evidence or produce documents shall be issued to compel the attendance before an arbitrator or umpire of a witness wherever he may be within Malaysia. This provision seems unclear in its statement that a party may take out a summons to give evidence or to produce documents but that no person shall be compelled to produce any document which he could not be compelled to produce on the trial of an action. The use of *may* shows that it is at the discretion of the High Court to order that a summons to a witness to give evidence or produce documents shall issue to compel attendance before an arbitrator or umpire.

The High Court may also intervene, according to sub-move 5, to issue a order to bring up a prisoner for examination before any arbitrator or umpire.

Sub-move 6 provides the other orders that the High Court has. A qualification is inserted within the verb phrase to give precision to the powers of the High Court: *shall have, for the purpose of and in relation to a reference, the same power...*

Two qualifications are placed at the end to make the provision very clear: *as it has for the purpose of and in relation to an action or matter in the High Court; and*

*Provided that nothing in this subsection shall be taken to prejudice any power which may be vested in an arbitrator or umpire of making orders with respect to any of the matters aforesaid.*

In the list of specific powers of the High Court, a number of binomial and multinomial expressions are found:

documents and interrogatories  
 before an officer of the High Court or any other person  
 issue of a commission or request  
 the preservation, interim custody or sale of any goods  
 the detention, preservation or inspection of any property or thing  
 to enter upon or into any land or building  
 any samples to be taken or any observation to be made or experiment  
 to be tried  
 necessary or expedient  
 full information or evidence  
 interim injunctions or the appointment of a receiver

Section 23 also contains the High Court's wide discretion of power.

23. Power to remit award

- (1) In all cases of reference to arbitration, the High Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire.
- (2) Where an award is remitted, the arbitrator or umpire shall, unless the order otherwise directs, make his award within three months after the date of the order.

24. Removal of arbitrator and setting aside of award

- (1) Where an arbitrator or umpire has misconducted himself or the proceedings, the High Court may remove him.
- (2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.
- (3) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application.

Section 23 appears to confer a wide discretion of power to the court to remit an award. However, the power of the court to set aside an award is not unlimited and section 24 (2) provides that the High Court may set aside an award only where an arbitrator or umpire has misconducted himself or the proceedings or that the award had been improperly pro-

cured. This means that the power of the High Court to set aside an award is restricted to cases when some form of unjustness or biasness is involved, although the word 'misconducted' has a broad meaning.

## 8. Conclusion

This paper has focused on a specific and limited area of law, that is, the Malaysian Arbitration Act. It examines some aspects of content in the MAA as compared to that in the ML such as the differences in the definitions given and the differences in requirements for the appointment of arbitrators. The concept of Umpire which is not found in the ML is present in the MAA and the conditions specified for failure of the arbitrator to act is rather detailed in the MAA. The linguistic analysis of the MAA indicates the wide range of the powers of the High Court involving different aspects of arbitration, vagueness in the qualifications required for the appointment of arbitrators and the discretionary power of the High Court through the use of adverbials and binomial and multinomial expressions. Some differences in terms of specificity and lack of adequate specification and differences in legal systems and procedures are discussed. The analysis does show that the content and language used are influenced by national requirements and concerns, culture, legal system and other constraints.

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