Singapore Journal of Legal Studies
[1993] 656 – 667

INSTITUTIONAL ARBITRATION IN ASIA – THE EXPERIENCE OF THE KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION[1]

This article outlines the development of the Kuala Lumpur Regional Centre for Arbitration. It also examines the measures necessary to foster a conducive environment for arbitration and the steps which have been taken in Malaysia towards this end.

I. INTRODUCTION

IT is fifteen years since the Kuala Lumpur Regional Centre for Arbitration[2] was first established in 1978 under the auspices of the Asian African Legal Consultative Committee,[3] an inter-governmental organisation whose headquarters is in New Delhi, India.

The Centre is non-profit and was established in cooperation with and with financial assistance from the Government of Malaysia, which guarantees the independent functioning of the Centre.

One of the objectives for establishing the Centre was to provide a system for the settlement of disputes for parties engaged in trade, commerce and investment within the region. Another objective was to fill an existing void in developing countries in the mechanisms for the settlement of disputes between trading partners of the region as well as those belonging to other regions. Until very recently, there has been no history of resort to non-judicial methods of dispute resolution in developing countries, unlike in the West where there are well-established arbitral institutions.

II. DEVELOPMENTS

When the Centre was established in 1978, it was the only institution of its kind offering services in international arbitration in Asia. Its establishment has since spawned the growth of a number of national arbitral institutions in the Asia-Pacific region, such as those in Hong Kong in 1985,

---

[1] This paper was delivered at the 13th LAWASIA Conference, 12-16 September 1993, in Colombo, Sri Lanka.

[2] Hereafter, "the Centre".

[3] Hereafter, "AALCC".

Vancouver in 1986, followed by arbitration centres in Sydney, Melbourne, San Francisco, Los Angeles, Hawaii and, recently, in Singapore and Thailand in 1991. As a result of the shift in international trade to the Pacific Rim, it is to be expected that in the coming years, more and more national arbitration centres will be established in the region, not only competing with one another but also with other well-established institutions. In the very competitive arena of international arbitration, forum shopping for the most hospitable legal environment will characterise the international business scene in the years ahead. However, the Centre, which was established in a regional rather than a national context, will still have an important part to play for parties wishing to have a neutral and independent venue for the settlement of their disputes, outside national jurisdictions whose laws may be ill-suited to the practice of international commercial arbitration.

III. Independence of the Centre

It was important for us at the initial stages to convince potential users of arbitration that the Centre is a neutral institution free from Government interference in its operations. For that reason, the Government of Malaysia guarantees the independent functioning of the Centre in its Agreement with the AALCC, and it is interesting to note that there has not yet been a case involving the Government of Malaysia or its agencies where awards for or against the Government in arbitrations conducted under the Rules of the Centre have been set aside, or where enforcement has been resisted by either party to the dispute.

Although a major portion of its funding comes from the Government of Malaysia, the Centre reports directly to the AALCC and is responsible only to the Secretary-General of the AALCC.

IV. Creating a Favourable Legal Environment

1. *Amending the Malaysian Arbitration Act 1952*[4] *– section 34*

In order to attract international arbitrations to the Centre, it became clear that the Act would have to be amended to bring it in line with the needs of international arbitration. The Act, which is modelled on the UK Arbitration Act of 1950,[5] is in this respect 'outmoded' because of the case stated procedure and the right of appeal for an error of fact on the face of the record. Moreover, it provides for a great deal of judicial supervision

[4] Arbitration Act, 1952 (Revised 1972), Laws of Malaysia Act 93. Hereafter, "the Act".
[5] 14 Geo 6, c 27. Hereafter, "the UK Act".

over the appointment and the conduct of arbitrators and the arbitration process.

It was realised that these difficult issues would have to be addressed to overcome the reluctance of foreigners to arbitrate under such a regime. Accordingly, in 1980 the Act was amended to exclude from the application of the Act[6] international arbitrations conducted under the Rules of the Centre (which are the UNCITRAL Arbitration Rules)[7] and the Rules of the International Convention for the Settlement of Disputes. This is a unique provision not found in any other legislative regime, and goes even further than the UNCITRAL Model Law of Arbitration, since it frees international arbitrations from the constraints of the national legal system. This is something which most countries are not ready to do. Most countries would wish to retain some degree of control over arbitrations taking place in their territories.

International arbitrations are defined in the introduction to the Centre's Rules as those involving international disputes where the parties belong to, or are resident in, two different jurisdictions, or disputes involving international commercial interests.

2. *Adherence to the 1958 New York Convention*

Another legislative milestone was reached when the Government of Malaysia acceded in 1985 to the 1958 New York Convention for the Reciprocal Enforcement of Foreign Arbitral Awards and enacted the necessary implementing legislation to bring it into force. Until this stage, arbitral awards were enforceable only in Commonwealth countries under the Reciprocal Enforcement of Judgements Acts 1958. It was in the interest of the Centre that arbitral awards should be enforceable not only within

---

[6] A new s 34 was added to the Act by the Arbitration (Amendment) Act 1980, Laws of Malaysia Act A478. Section 34 reads as follows:

"S 34(1) Notwithstanding anything to the contrary in this Act or in any other written law but subject to subsection (2) in so far as it relates to the enforcement of an award, the provisions of this Act or other written law shall not apply to any arbitration held under the Convention of the Settlement of Investment Dispute Between States and Nationals of Other States 1965 or under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration at Kuala Lumpur.

(2) Where an award made in an arbitration held in conformity with the Convention or the Rules specified in subsection (1) is sought to be enforced in Malaysia, the enforcement proceedings in respect thereof shall be taken in accordance with the provision of the Convention specified in subsection (1) or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 as may be appropriate."

(3) The competent court for the purpose of such enforcement shall be the High Court.

[7] Adopted by the United Nations General Assembly on 15 December 1976 by Resolution No XXXI/98. Hereafter, "the UNCITRAL Rules".

Commonwealth countries but also among non-Commonwealth countries, if international arbitrations were to be attracted to the Centre.

As a result, the awards of the Centre are enforceable in all countries which are parties to the Convention as well as in Commonwealth countries. Malaysia's accession to the 1958 New York Convention was a step in the right direction, for soon after that, international arbitrations began to flow to the Centre.

3. *Judicial attitudes*

(a) *Non-intervention of the courts in arbitrations held under section 34 of the Malaysian Arbitration Act:* In a landmark decision[8] the Malaysian High Court upheld the principle of non-intervention of the courts in arbitrations held under the Rules of the Centre. An application to the High Court in Kuala Lumpur to intervene in such arbitration was dismissed on the ground that the court was prohibited by section 34 of the Act to exercise its supervisory function in such proceedings.

(b) *Allowing foreign counsel to represent their clients in arbitrations:* In another landmark decision[9] the High Court in Malaysia upheld the right of parties to be represented by persons of their own choice. This is described by Professor Lowenfeld as part of the customary law of international arbitration.[10] This case contrasts with the Singapore case of *Builders Federal (Hong Kong) Ltd and Joseph Gartner & Co* v *Turner (East Asia Pte Ltd),*[11] which prohibited foreign lawyers from appearing in arbitration proceedings, but new legislation has been introduced to change this situation.[12]

4. *Arbitration options under the Act*

Since the Act is modelled on the UK Act, no distinction is drawn between domestic or international arbitrations in the Act. Thus, it is possible for international businessmen to opt to arbitrate under the general provisions of the Act or under the Rules of the Centre.

International businessmen wishing to arbitrate in Kuala Lumpur can and do have the best of both worlds as they can elect whether to arbitrate under

---

8 *Klockner Industrie-Anlagen GmbH* v *Kien Tat Sdn Bhd and another* [1990] 3 MLJ 183.
9 *Zublin Muhibbah Joint Venture* v *Government of Malaysia* [1990] 3 MLJ 125.
10 (1988) 5 J Int Arb (No 3), at 71.
11 [1988] 2 MLJ 280.
12 See s 34, Legal Profession (Amendment) Act 1992 (No 7 of 1992).

the Rules of the Centre and benefit from the liberal regime offered by section 34, or under other Rules and be subject to the more rigorous regime laid down in the general provisions of the Act.

5. *The Malaysian Evidence Act, 1950*[13] *does not apply to proceedings before an arbitrator*

Bearing in mind that the UNCITRAL Rules are intended to give maximum flexibility to the arbitral process and maximum freedom to the parties and arbitrators in the choice of arbitrators and the conduct of arbitrations, the legal provision excluding arbitration proceedings from the application of the Evidence Act[14] is an advantage since parties do not need to be bound by technical rules of evidence as are inherent in English-style arbitrations practised in common law countries. Without this rule, it would be open to a party to block the reception of an inadmissible fact by invoking the rules of evidence. It has been pointed out by Redfern and Hunter:

> International tribunals composed of experienced arbitrators, whether they are from common law or civil law countries, tend to concentrate on establishing the facts necessary for the determination of the issues between the parties, and are extremely reluctant to be limited by any restrictive rules of evidence that might frustrate them from achieving this goal. It is essential for practitioners, particularly from the common law tradition, to appreciate this and to learn not to place reliance upon technical rules concerning the admissibility of evidence during the course of the proceedings, particularly at the hearings.[15]

The inference to be drawn from this statement is that international arbitral tribunals lean towards a flexible approach to procedure, especially in regard to the presentation of evidence. Article 25.6 of the UNCITRAL Rules, which provides that the arbitral tribunal shall determine the admissibility, relevance and weight of evidence offered, does seem to reinforce this conclusion.

6. *Administrative Rules of the Centre*

Article 2 of the administrative Rules provides that the Centre shall serve as an international institution in the field of arbitration and perform the following broad-based functions:

---

[13] (Revised – 1971), Laws of Malaysia Act 56. Hereafter, "the Evidence Act".

[14] S 2 of the Evidence Act.

[15] *Law and Practice of International Commercial Arbitration* (2nd ed, 1991), at 327.

(i) Promoting international commercial arbitration in the region;

(ii) Coordinating and assisting the activities of existing arbitral institutions, particularly among those within the region;

(iii) Rendering assistance in the conduct of ad hoc arbitrations, particularly those held under the UNCITRAL Rules;

(iv) Assisting in the enforcement of arbitral awards.

7. *Inter-institutional arrangements for cooperation*

In pursuance of the above functions, inter-institutional arrangements for cooperation with existing arbitral institutions have been entered into by the AALCC and the Centre for mutual cooperation and assistance, as well as for securing the services of well-established institutions within the region in specialised fields, for the benefit of the countries of the region.[16]

8. *Functions of the Centre*

(a) *Information and advice*: During its early stages, the Centre's main preoccupation was providing *information and advice* on arbitration, about which there was a lack of basic information among businessmen and professionals, including lawyers. In particular, there was a lack of knowledge on how to proceed with arbitration. The Act does not set out the procedural rules for the actual conduct of arbitration proceedings and it is case law which prescribes that arbitrators are to conduct arbitrations according to the principles of natural justice. Since this may vary with the circumstances of each case, and with each arbitrator the temptations to seek judicial intervention in its interpretation by dissatisfied parties cannot be overlooked. As arbitrators do not have to be lawyers the absence of procedural rules may present some difficulties to those not practised in the art of arbitration, so the provision of guidelines on the conduct of arbitration may be useful both to the arbitrators and the parties involved.

[16] Such arrangements have been entered into with the following: The World Bank's International Centre for Settlement of Investment Disputes (ICSID), the Tokyo Maritime Arbitration Commission, the Indian Council of Arbitration, the Japan Commercial Arbitration Association, the American Arbitration Association, the Australian Centre for International Commercial Arbitration, the Preferential Trade Area for Eastern and Southern African States Centre for Commercial Arbitration at Djibouti (PTA) and the Scottish Council of Arbitration.

The Centre provides information on the scope and application of its Rules, which, as mentioned, are those of UNCITRAL with minor modifications. The UNCITRAL Rules provide a ready-made procedure for the conduct of arbitrations. For example, the principle of arbitral autonomy is given recognition by the provisions in that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.[17] The Rules also provide for such matters as time limits for pleadings and delivery of documents; the procedure for cases where there is default of appearance or failure to produce documents; for evidence to be produced by affidavit in place of oral evidence; and for advance payments to be made in respect of arbitrators' fees and expenses. The Rules allow a great deal of flexibility in the conduct of arbitral proceedings and leave a wide discretion to the parties in regard to the choice of arbitrators, the place of arbitration and the applicability of the procedural rules.

Though the information and advice of the Centre remain focussed on these aspects of arbitration, philosophical aspects, namely, that arbitration is a service industry intended to resolve commercial disputes in a speedy and cost-effective way, are not overlooked. This is an important consideration to keep in mind for the majority of arbitrations that take place are of a modest character involving amounts of a few hundred thousand or a few million dollars. However, complex international arbitrations which may involve multi-million dollar contracts are not cheap as they involve experts, lawyers and arbitrators who may come from different countries and whose remuneration, travel expenses, hotel and subsistence allowances have to be met. These cases do not arise everyday. Most cases involve smaller or medium-sized construction disputes and for that reason, it is important to keep the costs low, if possible.

In the West, arbitration is said to be in a state of doldrums because of its escalating costs and delays due to 'over-lawyering' or legalisation of the arbitral process. Arbitration is said to be losing its appeal as a cost-effective and expeditious method of resolving

[17] Art 15, UNCITRAL Rules.

disputes as lawyers and lawyer-arbitrators tend to conduct arbitration with court procedures.

The present trend is to avoid adversarial procedures in the interest of settling disputes amicably. As the arbitration system moves eastwards in tandem with the expansion of trade, this rather important aspect of arbitration should be kept in mind if it is to recover some of its earlier standing as an activity serving the needs of the commercial community. It is a fact that traditional methods of dispute resolution in the East emphasise the conciliatory aspects of dispute settlement more than its adversarial aspects. Thus, it should be possible to temper the rigidities of English-style arbitration with more flexible procedures which will reflect the multi-cultural nature of international commercial arbitration of today. The developing countries can point the way in this regard by encouraging the voluntary settlement of disputes in an atmosphere of amicability and efficiency which can be cost-effective as well.

(b) *Selection and appointment of arbitrators:* The Centre assists in the selection and appointment of arbitrators with the necessary expertise and skills, who must above all be neutral, unbiased and independent as required under the Centre's Rules. The institution administering arbitration should be able to assess the type or character of arbitrator which an arbitration might require, suggest suitable names to the parties and advise parties to the extent that they require, for the test of an administering agency is its ability to appoint arbitrators of the requisite expertise and experience to manage a specific arbitration.

The Centre maintains a Panel of domestic and international arbitrators whose names are not published. Applications from individuals to be included in the Panel are usually screened. In an increasing number of arbitrations, the Centre acts, when requested, as the appointing authority where the parties are not in agreement on the appointment of an arbitrator or where it is ordered by the Court to appoint one. Representing a network of international arbitration institutions, the International Federation of Commercial Arbitration Institutions, of which the Centre is a member, has been set up to assist in this direction by affording users of arbitration a pool of international arbitrators from a large geographical area with the necessary experience and skills. Such institutional cooperation should lead to quality arbitrations worldwide.

(c) *Services and facilities for arbitration:* The Centre provides services and facilities for the conduct of arbitration. This includes providing suitable accommodation for sittings of the arbitral tribunal, secretarial assistance and interpretation facilities.

The Centre provides a variety of routine services. These services involve procedural arrangements for receiving the Notices of Arbitration, commencing the arbitration process, fixing fees, collecting advances, selecting and/or appointment of arbitrators, contacting parties or their lawyers to ensure prompt response to various time limits and generally overseeing the proceedings to ensure expedition and to avoid unnecessary delay. Acting according to the spirit of the UNCITRAL Rules, the Centre's role lies more in administering rather than supervising arbitrations, which characterise some other institutions. Its role is to give advice and guidance to parties and arbitrators whenever necessary or if requested to do so.

9. *Costs of arbitration*

The costs of arbitration including the fees of arbitrators, the expenses reasonably incurred by the Centre in connection with the arbitration as well as its administrative charges, are borne by the parties in such proportion as may be determined in the arbitral award.

The fees of arbitrators, which depend on several factors, such as the complexity of the case, the nature of the dispute, time spent and the expeditious conduct of the proceedings, are fixed in each case in accordance with the Schedule annexed to the Centre's Rules.

These fees have been revised and are now based on a percentage of the amount in dispute on a lump sum basis. The objective is to encourage the expeditious conduct of the proceedings, and is also intended to give the parties some idea of the costs involved, which it is not possible to do when fees are based on a time-spent basis.

The administrative charges of the Centre are also fixed on a percentage of the amount in dispute, and are on a much lower scale than arbitrators' fees, with a ceiling of US$20,000, in view of the non-profit character of the Centre. The costs of the arbitral tribunal exceed the administrative charges of the Centre by a wide margin, and the combined charges of the Centre and the fees of the tribunal are usually less than legal and other costs incurred in the arbitration.

10. *Seminars and conferences*

The Centre organises conferences and seminars on international arbitration and alternative methods of dispute settlement and also holds arbitrator training workshops. Participants in a recent Workshop held in January last year came from Thailand, Singapore, Australia, Nepal and Sri Lanka. The arbitrator development programme is designed to enhance the skills of professionals and experts who may act as arbitrators. These include lawyers, judges and other potential arbitrators. With the anticipated demand for arbitration and other alternative dispute resolution techniques which are in vogue today, lawyers and professionals should be trained to meet the challenges ahead.

VI. CONCLUSION

The task of establishing a new Centre is not an easy one. Institutional arbitration has had a long history in developed countries, but is a relatively new phenomenon for developing countries. There was initial resistance from the arbitration world to the setting up of the regional centres by the AALCC – a Committee of 42 developing countries[18] – which would provide relatively

---

[18] The member countries of the AALCC are:

1. Arab Republic of Egypt
2. Bangladesh
3. People's Republic of China
4. Cyprus
5. The Gambia
6. Ghana
7. India
8. Indonesia
9. Islamic Republic of Iran
10. Iraq
11. Japan
12. Jordan
13. Kenya
14. Democratic People's Republic of Korea
15. Republic of Korea
16. Kuwait
17. Libyan Arab Jamahiriya
18. Malaysia
19. Mauritius
20. Mongolia
21. Myanmar
22. Nepal
23. Nigeria
24. Oman
25. Pakistan
26. The Philippines
27. State of Palestine
28. Qatar
29. Saudi Arabia
30. Senegal
31. Sierra Leone
32. Somali Democratic Republic
33. Sudan
34. Singapore
35. Sri Lanka
36. Syria
37. Tanzania
38. Thailand
39. Turkey
40. Uganda
41. United Arab Emirates
42. Republic of Yemen

Associate Member: Botswana
Permanent Observers: 1. Australia 2. New Zealand

inexpensive access to services which had been available only in Europe or America. Misgivings were also created in some quarters that the establishment of regional centres would impede the growth of national institutions in the region. KL Centre is one of two Centres set up by the AALCC in 1978. The other is the Cairo Centre. However as we have seen earlier,[19] the opposite is the case. In the decade that followed the Centre's establishment, at least nine national arbitral centres were established in quick succession in the Asia-Pacific region. It was not until later that the realisation came that these centres would have a significant impact on the increased use of commercial arbitrations and would be an important source of information for businessmen.

As a result of these developments, an Asia-Pacific Council for Commercial Dispute Resolution Centres has been set up to promote Co-operation within the Asia Pacific Centres to make their services well-known. A more recent development is the formation of the International Federation of Commercial Arbitration Institutions (IFCAI), whose aims are to establish and maintain permanent relations between commercial arbitration institutions, foster a broad exchange of information on all aspects of arbitration and conciliation, encourage the responsible use of these dispute resolution techniques, and facilitate the exchange of information on member organization services.

It is also worth noting that it takes a long time after services are available before arbitrations begin to come in – particularly at an international level. Although the Centre is regional and international in scope and character, it is not possible to discover how many countries have incorporated the Centre's Arbitration Clause. A dispute may not arise or if it does, it may not be referred to the Centre until several years later, and sometimes a settlement may be arrived at before the stage of arbitration is reached. There have been some contracts concluded in India, Indonesia, Singapore and Thailand which have incorporated the Centre's arbitration clause though the number is unknown. From the Centre's surveys conducted in Malaysia alone, from 1989 to 1991, there have been some 3,000 international contracts, which have incorporated such a clause. The parties are engaged in telecommunication, defence, road and sea transportation, petroleum, construction, engineering works or trade in commodities like pepper, cocoa and rubber, and tin.

What are the criteria for international acceptability of arbitral institutions? "They are permanence, impartiality and competence. Institutional

[19] See *supra,* "II. Developments" at 656.

experience, competence and integrity, count for more than choice of venue."[20]

In the years ahead, institutional arbitration will play an increasing role in international arbitration. For such growth to take place, "the various institutions that offer such services must cooperate in providing a harmonious network of administrative and educational facilities. Commercial interests, representing many nations and various economic systems and social communities, are expressing an ever increasing demand for such services. Parties who are involved in transnational commercial disputes require an impartial, global network, insulated from national prejudices. They will need to resolve their disputes efficiently, with confidence that the arbitration mechanism that they select will provide reliable, practical and impartial services."[21]

PG LIM*

---

[20] Jan Paulsson, "Resolution of Disputes – Arbitration vs Litigation", International Conference (Energy Section), Kuala Lumpur, October 1992, said: "Care should be taken when considering any of the many cities which by the early 1990's were presenting themselves as Regional 'Centres' for international arbitration. To take the Pacific-Rim as just one example, there are Centres of varying degrees of credibility... the Kuala Lumpur Regional Centre for Arbitration has impressed many international practitioners by its sustained and credible efforts to be recognised as a truly neutral and competent body."

[21] R Coulson, "The Future Growth of Institutional Administration in International Commercial Arbitration" in *The Art of Arbitration* (1982), at 73.

* MA (Cantab), FCI Arb; former Ambassador of Malaysia; Director of the Kuala Lumpur Regional Arbitration Centre since 1982.