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AALCC Dispute Settlement and the UNCITRAL Arbitration Rules

by
B. Sen†

I. BACKGROUND

The involvement of the Asian-African Legal Consultative Committee (hereinafter AALCC) in the field of international commercial arbitration has been closely linked to the work of the United Nations Commission on International Trade Law (hereinafter UNCITRAL) on that topic. At the Tokyo Session of the AALCC in January 1974, its Trade Law Subcommittee noted the observations and suggestions contained in the valuable report of UNCITRAL Special Rapporteur, Professor Ion Nestor, and recommended that efforts be made by member states to develop institutional arbitration in the Asian-African region. The recommendation of the Tokyo Session assumed importance in light of the Declaration on the New International Economic Order (NIEO) adopted by the U.N. General Assembly in that year — the culmination of efforts by the developing nations which began at the Havana Conference in 1947-48 and included methods for the settlement of commercial disputes.

A broad survey of the pattern of dispute settlement mechanisms and the thinking in our region with respect to them was made soon after the Tokyo recommendations. The survey revealed some interesting features. The types of transactions that seemed of special interest to our countries, apart from the normal trade in goods and services between private parties, were commodity trade, purchase of goods, shipping and maritime transport. Above all, our region is interested in development projects and investment. We encountered no difficulty with dispute settlement methods where the normal flow of international trade was concerned; such methods included ad hoc arbitrations under national laws, as well as institutional arbitrations administered by chambers of commerce, both national and international. In regard to commodity trade, there was a good deal of dissatisfaction about the manner in which trade associations handled arbitrations. Of concern were the appointment of arbitrators and the conduct of arbitral proceedings, especially as to the opportunities for representation by the parties. Indeed, many national courts were reluctant to enforce the awards rendered by such institutions on

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the ground that they opposed the principles of natural justice. Of greatest concern to the governments was the manner in which disputes between government undertakings and contractors should be handled where the transactions related to projects of national importance. The distinct preference shown by host governments was for ad hoc arbitrations, wherever possible under their own laws, although they had agreed in several instances to institutional arbitrations outside the region due to the superior bargaining position of the contractors supplying machinery and technology under tied credits and development assistance programs. Their main objections to institutional arbitration focused on the selection of the sole or the third arbitrator, the place of arbitration, the time-consuming process, and the costs involved. On the other hand, ad hoc arbitrations in international transactions appeared to be beset by many problems, especially the refusal of parties to respond to the request for arbitration, uncertainty as to the procedural rules to be applied, questions concerning the custody of records, and the absence of any supporting secretariat for the arbitral tribunal.

The UNCITRAL Arbitration Rules¹ (hereinafter the UNCITRAL Rules), adopted in 1976, seemed to provide a way to resolve some of the difficulties experienced in ad hoc arbitrations. Their adoption helped to create the right atmosphere for the AALCC's Kuala Lumpur Session of July 1976 that immediately followed the UNCITRAL meeting. The AALCC requested its Secretariat to investigate the feasibility of establishing regional centers for commercial arbitration within the Asian-African region. It was the clear understanding at that time that one of the major functions of these centers would be to promote the use of the UNCITRAL Arbitration Rules and to provide some kind of institutional structure to assist in the administration of those rules.

II. THE AALCC DISPUTE SETTLEMENT SCHEME

The AALCC's dispute settlement scheme, approved and adopted at its 1977 Baghdad and 1978 Doha Sessions, contemplated several broadbased functions for the Secretariat and the Regional Centers. The scheme sought to create a climate for the promotion of arbitration, including assistance in the enforcement of awards. Systematic enforcement is essential for building confidence in the process of arbitration. Thus, an important function was to develop national arbitral institutions in the region and to coordinate their activities.

Another major function of the Centers was to assist in the conduct of ad hoc arbitrations, particularly those applying the UNCITRAL Rules. The Regional Centers could provide facilities for conducting proceedings, and possibly act as the secretariat in ad hoc arbitrations. This was a matter of

1. The UNCITRAL Arbitration Rules are printed *infra* in the Appendix to this issue of the International Tax & Business Lawyer.

some importance in promoting the UNCITRAL Rules in ad hoc arbitrations, for which they were primarily intended. Here the consideration seemed to be that if governments preferred ad hoc arbitration, the UNCITRAL Rules could well prove appropriate. The process could be facilitated if some of the difficulties inherent in ad hoc arbitrations could be resolved by providing a system to handle the filing of papers, the maintenance of records and secretarial assistance.

A third function entrusted to the Centers to help promote the broader objectives of international commercial arbitration was to provide the services of the Centers to facilitate arbitration proceedings within the region, even for arbitrations sponsored by arbitral institutions located outside the region. Agreements were made with the International Center for the Settlement of Investment Disputes (hereinafter ICSID) in Washington under which arbitral proceedings conducted wholly or in part under the ICSID Convention could be held at the Regional Centers for Arbitration in Cairo and Kuala Lumpur at the option of the parties.

Another important function assigned to our Centers was to provide arbitration under their own auspices where appropriate. This function was by no means the most important and can perhaps be regarded as a residual function, since the aim of the AALCC is to promote all arbitration, particularly ad hoc arbitrations using the UNCITRAL Rules.

III. FRAMING PROCEDURAL RULES TO MEET AALCC NEEDS

One of the important questions before our Trade Law Subcommittee was what procedural rules to apply where it was considered appropriate for the Centers to provide arbitration. The Subcommittee considered it appropriate to apply the UNCITRAL Rules even for institutional arbitrations for several reasons. First, since one of our main objectives is to promote the UNCITRAL Rules, it seemed natural that these rules should be applied in the arbitrations handled by the AALCC Centers. It was found that there was no inherent difficulty in applying the rules with modifications even to institutional arbitrations. Second, since the governments of our region prefer ad hoc arbitrations, institutional arbitrations administered by our Centers should be as analogous as possible to ad hoc arbitrations. They should provide flexibility in the appointment of arbitrators, the place of arbitration and the applicable rules. Third, it was felt that since the UNCITRAL Rules were recommended by the U.N. General Assembly and were likely to be more acceptable to the international community than a set of rules formulated by the AALCC, they might be better tailored to the region. Indeed, this consideration seemed to have carried much weight with several institutions which apply the UNCITRAL Arbitration Rules with adaptations to institutional arbitrations. However, certain difficulties are predictable in applying the UNCITRAL Rules in institutional arbitrations because they are primarily intended for ad hoc arbitrations. Some of these difficulties can be met by

modifying the rules in accordance with the Guidelines laid down by UNCITRAL itself, but certain matters are somewhat more complex.

One major issue that has arisen is to determine the type of cases where it would be best for our Centers to provide institutional arbitration under our own modified version of the UNCITRAL Rules. The scope of application of the UNCITRAL Rules is set forth in Article 1(1):

Where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modifications as the parties may agree in writing.

Under a plain reading of this provision it would appear that there is no limitation to the applicability of these rules. They could thus be used in purely domestic arbitrations as well as in arbitrations arising out of international transactions. However, the General Assembly resolution recommending the application of these rules clearly contemplated that they be applied to settling disputes of an international character, presumably in recognition of the fact that several nations had promulgated laws to conduct arbitrations within their own territories. In countries that have adopted such legislation, it is often a moot point to determine the cases and classes of cases that would be governed by the legislation. This fact raises important issues concerning the power of courts to appoint arbitrators, rule on a party's challenge to an arbitrator, supervise arbitral proceedings or set aside an award.

There can be no doubt all arbitrations over purely domestic transactions must be governed by the applicable national procedure law and the exercise of jurisdiction by the municipal courts thereunder. There is, however, some divergence in approach on the question of whether local laws should be applied in international arbitrations. While the attitude in most common law countries is not to make any distinction, some countries seeking to attract international arbitrations to their territories have enacted specific legislative provisions excluding the applicability of their domestic laws to such arbitrations, especially laws on the supervisory powers of the municipal courts.

In some other countries the courts have held international arbitrations to be exempt from national arbitration laws. For example, in an Indian case governed by the ICC Rules, the Supreme Court of India took the view that the Indian Arbitration Act, which contained procedural provisions on the conduct of arbitrations, was not applicable since other legislation was in force concerning the enforcement of foreign arbitral awards. In Malaysia, a 1979 law provides that the country's Arbitration Act is inapplicable in cases where the arbitration is conducted under the UNCITRAL Rules or the Rules of the AALCC Kuala Lumpur Center. This law was passed with the understanding that the UNCITRAL Rules would be applied to international transactions as contemplated by the U.N. General Assembly and that the Kuala Lumpur Center would conduct arbitrations only for the type of transactions indicated in the published brochures of that Center.

We have experienced difficulty, however, in determining precisely the type of transactions that could be classed as "international". The issue that has arisen for consideration is whether our Center should handle an arbitration between a national entity and the subsidiary of a foreign country registered within the territory of the host State, even though the subsidiary company is wholly controlled by the parent company abroad and the transaction in question involves movement of goods and services from one jurisdiction to another. No guidelines are available for determination of the issue, either in the debates on the UNCITRAL Rules or in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Fortunately, the Model Law on International Commercial Arbitration adopted at the 1985 UNCITRAL session contains some guidelines for characterizing an arbitration as "international". Article 1(3) of the Model Law provides that:

An Arbitration is international if:

- (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
- (b) one of the following places is situated outside the State in which the parties have their places of business:
 - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
- (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.²

The U.N. General Assembly is likely to recommend in 1986 that states should consider the Model Law when they enact or revise their laws to meet the current needs of international commercial arbitration. This may be taken as an endorsement by the international community of the provisions contained in the Model Law for determining the types of transactions that could be considered "international" and to which the UNCITRAL Rules could apply in both ad hoc and institutional arbitrations.

IV. PROBLEMS IN APPLYING THE UNCITRAL RULES

One difficulty that may confront the arbitrators is determining the precise procedural rules to apply in a given case. In institutional arbitrations, whether held under the auspices of commodity or shipping trade associations or under the auspices of national and international chambers of commerce, there has invariably been a set of uniform rules governing the most essential issues. These include rules on the choice and appointment of arbitrators, initiation of arbitral proceedings, replies, counterclaims, pleadings and written

2. UNCITRAL Report, 40 U.N. GAOR Supp. at 3, U.N. Doc. A/40/17 (1985), *reprinted in* 24 I.L.M. 1302 (1985).

statements, hearings, making of awards, time limits, finality and publication of awards.

While the UNCITRAL Rules set forth provisions on all these matters, they contemplate variations in certain circumstances. First, the Rules can be modified by the written agreement of the parties. Second, where the Rules are in conflict with a provision of law applicable to the arbitration from which the parties cannot derogate, the latter law shall prevail. These reservations were no doubt incorporated to provide a degree of flexibility and greater acceptability to governments, and to ensure that the proceedings are not invalid due to non-observance of mandatory laws. These provisions are important to ensure wider international acceptability of both institutional and ad hoc arbitration.

The difficulty, however, is the practical application of these rules in institutional arbitrations. On the one hand, the procedure applied in institutional arbitrations should be uniform, so that the parties are aware of the applicable rules at the time they incorporate the arbitration clause into their contracts. Uniform application of procedural law leads to stability and confidence in the arbitral institution. On the other hand, since arbitration is a dispute resolution method of the parties' choice, it should be open to the parties to determine the rules which should govern the proceedings. Whatever the right approach might be, it appears to present no practical problem to the arbitral tribunal if the parties agree in writing to modify the rules.

Paragraph 2 of Article 1, however, places a somewhat more difficult burden on the arbitral tribunal in cases where it must determine the mandatory provisions of law, since it is obliged to examine the provisions of the applicable procedural law in each case. This examination would presumably be confined to the law in force in the country where the proceedings are held, and would therefore present few problems in countries where, by legislation or judicial interpretation, arbitration under the UNCITRAL Rules is deemed to be outside the purview of domestic legislation. The position, however, is not completely clear in the text of the UNCITRAL Rules.

Another difficulty which may be encountered in applying the UNCITRAL Rules in institutional arbitrations is the appointment, challenge and replacement of arbitrators. According to the existing pattern of institutional arbitrations, the institution administering the arbitration has usually been entrusted with these matters. For example, in commodity or shipping arbitrations held under the auspices of trade associations, arbitrators are appointed by the governing body of the institution concerned from a standing panel of eligible arbitrators. Any challenge to the arbitrator or his replacement is generally determined by the governing body, whose decision is final. In arbitrations held under the auspices of some national and international chambers of commerce, the procedure is virtually identical. In the case of the ICC, the nomination of the sole arbitrator or the third arbitrator is done by

the ICC Court of Arbitration in the manner provided for in the ICC Rules.³ Challenges to arbitrators, including those nominated by the parties, are also resolved by the Court. The developing countries have generally been critical of the functions performed by institutions in such matters, on the ground that there is inadequate consultation with the parties. The question remains whether application of the UNCITRAL Rules without suitable modifications could improve the situation.

The UNCITRAL Rules contemplate that where the parties cannot agree on the nomination of the sole or presiding arbitrator, and where the second party has failed to nominate its arbitrator, the appointment shall be made by an appointing authority to be agreed upon by the parties, failing which the appointing authority shall be designated by the Secretary-General of the Permanent Court of Arbitration. The lists procedure envisaged in Articles 6 and 7 for the selection of the sole or presiding arbitrator appears to allow the parties sufficient opportunity to agree on the choice of an arbitrator. But in controversial cases the appointing authority has often been a single individual. There are no guidelines in the UNCITRAL Rules for the selection of the arbitrator by the appointing authority. Nor are there guidelines for the inclusion of names in the lists except as stated in Article 6(4), which provides that in making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.

The appointment of arbitrators by the appointing authority under the UNCITRAL Rules therefore appears to be no improvement on the existing procedure in institutional arbitrations, where the sole or presiding arbitrator is chosen by the institution itself, a procedure which has often been criticized by many developing countries. When an arbitrator is challenged, the determination of that question under the UNCITRAL Rules is also made by an appointing authority, and no guidelines are prescribed in regard to the manner of ruling on a challenge.

V. MODIFICATION OF THE UNCITRAL RULES

In our rules for the Centers, we have tried to improve the situation somewhat by providing an option to the parties to designate an appointing authority. If they fail to do so, the Center becomes the appointing authority and a designated committee rather than a single individual will make the appointments. Even for the purposes of following the lists procedure, or having to appoint an arbitrator, the Center is restricted in its choice to an international panel of arbitrators which has been established in consultation with both the governments of the region and those countries having close links with the countries of the Asian-African region in the fields of trade, commerce and

3. The ICC Rules are reprinted *infra* in the Appendix to this issue of the International Tax & Business Lawyer.

investments. It is our view that in applying the UNCITRAL Rules, the appointing authority ought not to be a single individual unless the parties themselves so decide. The institution adopting the UNCITRAL Rules should lay down some guidelines for selecting the arbitrators rather than giving *carte blanche* to the appointing authority in selecting names for the lists procedure or in making the appointment itself. It is also necessary, although we ourselves have not yet done so, to establish guidelines for ruling on challenges to the choice of arbitrators.

We did not modify the UNCITRAL Rules concerning venue, in order to allow full freedom to the parties and the arbitral tribunal to determine the place of arbitration, just as in ad hoc proceedings. This was consistent with our policy that institutional arbitrations provided by our Centers should be as similar as possible to ad hoc arbitrations, which have been preferred by the governments of the developing countries. Nevertheless, we foresee that some practical difficulties may arise. Under the rules of the Centers, the Director of the Center is required upon request by the arbitral tribunal or either party to provide such facilities and assistance for the proceedings as may be required. This includes accommodations for the hearings, secretarial assistance, and interpretation facilities. It might be possible for us to make arrangements with the national institutions, but it may be preferable for institutions applying the UNCITRAL Rules to contemplate that the place of arbitration should normally be the seat of the institution, unless the parties agree otherwise.

We have not modified the UNCITRAL Rules concerning the language to be used in the proceedings, which give the parties and the arbitral tribunal as much freedom of choice as possible without institutional interference. In light of our experience, however, we feel that it might speed the progress of arbitration if the administering institution had authority to choose the language, after consultation with the parties and the arbitrators, in cases where the parties are unable to agree upon what language or languages to use in the proceedings.

Applying Article 21 of the UNCITRAL Rules may also prove to be difficult. Article 21 provides that the arbitral tribunal shall have the power to rule on any party's objection to jurisdiction, including any objection as to the existence or validity of the arbitration clause or separate arbitration agreement. Paragraph 4 further provides that the arbitral tribunal shall be competent to proceed with the arbitration and to rule on issues of jurisdiction in a final award. We do not envisage any difficulty in the application of this rule for arbitral proceedings held at the Kuala Lumpur Center, in view of the Malaysian law which exempts arbitrations held under both the UNCITRAL Rules and the Rules of the Center from the operation of local laws. However, difficulties are likely to arise in applying this provision in many common law countries, where the jurisdiction of the arbitral tribunal and the interpretation and validity of the arbitration clause are matters to be determined by the

municipal courts. Article 1(2) partly resolves such problems, and Article 21 will obviously not apply in ad hoc arbitrations held in a country whose municipal law vests such matters in its own courts. But the problem is that institutional arbitrations based on UNCITRAL Rules are likely to conflict with the laws of the situs of the proceedings concerning the jurisdiction of the arbitral tribunal. We should therefore examine the desirability of requiring the venue of institutional arbitrations under the UNCITRAL Rules to be the seat of the institution. We can then decide upon retention or modification of Article 21 depending upon the law in force in the country where the institution is located. The same observations would possibly apply to the powers of the arbitral tribunal to take interim measures of protection under Article 26 of the UNCITRAL Rules.

The provisions in the UNCITRAL Rules on costs might also prove difficult to apply to institutional arbitrations, since a degree of uniformity on the question of costs is desirable so that the parties have notice of costs before they agree upon the arbitration clause. A well known source of dissatisfaction with institutional arbitration has been the cost of the proceedings. It is therefore necessary that the parties are assured before agreeing to submit a dispute to an arbitral institution that the costs will be reasonable. Because the UNCITRAL Rules were intended for ad hoc arbitrations, it was naturally difficult to incorporate a schedule of costs, which would depend to a large extent on the fees charged by the arbitrators.

In our rules, we have similarly recognized that costs will vary from case to case dependent upon the duration of the hearing and complexity of issues. We have also stipulated that the administrative charges of our Centers shall be determined in conformity with the principle that the AALCC Centers are nonprofit institutions, and should only recoup the costs actually incurred by them. We have, however, received numerous inquiries about the estimates of likely costs in a given case, which we have found difficult to answer. We have concluded that in institutional arbitrations it will be necessary to recommend a scale of costs, including a ceiling on the fees of arbitrators. In some countries, such as Japan, the institutional arbitrators undertake the responsibility of deciding disputes for negligible amounts, while in some other countries the sky is the limit for fees. A solution needs to be found if costs are not to prove a deterrent to international arbitrations.

VI. CONCLUSION

I have pointed out some of the main difficulties which we have experienced or which we foresee in the application of the present UNCITRAL Rules in institutional arbitrations. I have refrained, however, from suggesting any desirable amendments, even for ad hoc arbitrations, in light of some of the promising provisions of UNCITRAL's Model Law on International Commercial Arbitration adopted by UNCITRAL at its 1985 session.