

International Commercial Arbitration and the Developing Countries

R. Rajesh Babu*

Abstract

The recent years have seen a marked decrease in the opposition from the developing countries against arbitration as a means of settling trade disputes. This paper attempts to show that, even though the opposition of the developing countries has gone down, the conditions that created opposition against arbitration continue to be perpetrated and there still exist in the present set-up conceptual and institutional bias against the developing countries. In this context, this paper analyses three areas of international commercial arbitration i.e., whether arbitration is an effective mechanism for settlement of trade dispute for the developing countries, the power of arbitrators and the competence of national courts control and supervision over international commercial arbitration. The paper also analyses the contribution of the Regional Arbitration Centres established under the auspices of the Asian-African Legal Consultative Organization (AALCO), and stresses the need for promoting and strengthening these institutions.

1 Introduction

International commercial arbitration is a means by which disputes arising out of international trade and commerce could be resolved pursuant to the parties' voluntary agreement, through a process other than a court of competent jurisdiction. In other words, the object of arbitration is to obtain a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; and the parties should be free to agree on how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.¹ It is a consensual means of dispute resolution by non-governmental decision makers and produces a definitive and binding award which is capable of enforcement through national courts.²

* Senior Legal Officer, Asian-African Legal Consultative Organization (AALCO), New Delhi. The views expressed here are those of the author and not necessarily those of the AALCO Secretariat or its Member States.

¹ Section 1 (a) and (b), Arbitration Act 1991 (England).

² Cary B. Born, *International Commercial Arbitration in the United States: Commentary and Materials* (The Netherlands: Kluwer law and Taxation Publishers, 1994), p. 1.

The recent years have witnessed an increasing spur in the international commercial arbitration and a tendency to incorporation of compulsory standard arbitration clauses in every international commercial contract. The well-known reasons for the popularity of commercial arbitration is that it is predictable, held in private and avoids publicity, flexibility, less formal, cheaper and speedier than national court proceedings.³ However, single most important reason for this phenomenal increase could be attributed to the rapid expansion of international trade and the free market policies increasingly influenced by non-state actors. The new arrangement formed outside the nation State such as the multilateral economic institutions, the setting up of supranational legal standards⁴ and the non-governmental entities led by capital market and multilateral corporations have significantly contributed in promoting arbitration as a means of settling commercial disputes of international character, bypassing the test and standards set under the national judicial systems.

In the early years of international commercial arbitration as a alternative means of settlement of trade disputes, there existed an increasing criticism leveled by the developing world against it. Some of the major arguments of the developing world against commercial arbitration were that the practice of arbitration was configured in such a way as to consistently favour the economic interest of the developed world.⁵ Secondly, the applicable law under the disputes i.e., the doctrinal configuration of international law is working against the interest of the third world.⁶ In short, the developing countries contend that there exists institutional and doctrinal bias in international commercial arbitration.

However, in recent years there has been a marked decrease in opposition from the third world critics against arbitration as a means of settling trade disputes. Today, cries of foul play over arbitration are neither as vociferous nor as troubling as they were up to the end

³ Clive M. Schmitthoff and Kenneth R. Simnondo, *International Economics and Trade law* (Leyden, A.W. Sijthoff, 1976), p. 171.

⁴ *United Nations Convention on Contracts for the International Sale for Goods*, UNCITRAL, Hague Convention on Service and Evidence.

⁵ Amr A. Shalakany, "Arbitration and the Third World: A Plea for Reassuring Bias under the Specter of Neoliberalism", *Harvard International Law Journal*, vol. 21, no. 2, 2000, p. 424.

⁶ *Ibid.*

of last decade.⁷ What is the reason for this 'paradigm shift' in developing world's approach? Was this because perception of the bias in international commercial arbitration was a much-too-politicized debate or was there any substance in the allegation? And does that still exist?

Here in this paper, three areas of international commercial arbitration are analyzed, i.e., whether arbitration is an effective mechanism for settlement of trade dispute for the South, the power of arbitrators and the competence of national court's control and supervision over international commercial arbitration. By an analysis of these three issues, an attempt is made to show that arbitration in the present set-up continues to perpetrate conceptual and institutional bias against the developing countries. In this context, the role of the Regional Arbitration Centres established under the auspices of the Asian-African Legal Consultative Organization (AALCO) is examined, and stresses the need for continuing to promote and strengthen these institutions. Before that, an attempt is also made to sketch out the evolution of the legal framework of international commercial arbitration. This is to put in perspective the gradual evolution of international commercial arbitration as an independent regime devoid of constraints imposed by domestic legal systems.

2 The Evolution of the Legal Framework for International Commercial Arbitration

The modern international commercial arbitration as a technocratic mechanism of dispute settlement, with a particular set of rules and doctrines, is a product of the 20th century.⁸ As southern scholar Sornarajah puts it, "resorting to arbitration have started or have become necessary only after gunboat diplomacy was no longer the acceptable means to settle trade disputes with the former colonies of the third world".⁹

The first attempt to ouster the jurisdiction of national courts and unifying the legal regime of international commercial arbitration on terms favourable to western parties, started with the Geneva Protocol

⁷ Ibid., p. 420.

⁸ S.K. Roy Choudhery, *Law of Arbitration and Conciliation* (New Delhi: Eastern law House, 1996).

⁹ M. Sornarajah, "The Climate of International Commercial Arbitration", *Journal of International Arbitration*, vol. 8, 1991.

on Arbitration Clause 1923.¹⁰ The Geneva Protocol was followed by the International Convention on the Execution of Foreign Awards, 1927 (Geneva Convention). The purpose of the Convention was to widen the scope of Geneva Protocol of 1923 by providing recognition and enforcement of Protocol within the territory of contracting States and not merely the State in which the award is made.¹¹

Number of problems were encountered in the operation of the Geneva Convention 1928, with respect to field of applicability and a party seeking enforcement and in order to show that the award had become final in its country of origin, the successful party were often obliged to seek a declaration in the countries where the arbitration took place to the effect that the award was enforceable in that country before it could go ahead and enforce the award in the courts of the place of enforcement.¹² But this never lived up to the expectation of the western interests.¹³

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958,¹⁴ was a definite improvement over the Geneva Convention, especially in the enforcement of foreign arbitral awards. It provided for a much simple and effective method of obtaining recognition and enforcement of foreign arbitral awards. It gave wider effect and validity of arbitration agreement than Geneva Convention. To mitigate the shortcomings and to harmonize the current state of national laws on arbitration, UNCITRAL in 1985 adopted a Model Law on International Commercial Arbitration.¹⁵ The UN General Assembly by resolution¹⁶ recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice". The Model Law provided for an exclusive list of circumstances where the court could interfere and have supervision over an international award. The burden of proof that the court could exercise its jurisdiction was on the person who wants to reject the

¹⁰ *The Protocol on Arbitration Clause, 1923* (Geneva Protocol).

¹¹ *International Convention on the Execution of foreign Awards, 1927* (Geneva Convention)

¹² Alen Redfern and Mark Hunter, *Law and Practice of I.C.A.* (Second edn., 1989), p. 62 cited in *Renusagar Power Co. Ltd v. G.E. Co.*, AIR 1994 SC 860.

¹³ Paolo Cantini, "The UN Convention on Recognition and Enforcement of Foreign Awards", *American Journal of International Law*, vol. 8, 1959.

¹⁴ *New York Convention, 1958.*

¹⁵ Adopted on 21 June 1985 at the UNCITRAL's 18th Annual Session.

¹⁶ *General Assembly Resolution 40/72* of 11 December 1985.

enforcement of the award. Both these features were the introduction of the new Model Law.

Hence, the movement was one towards the total exclusion of the international commercial dispute from the supervision and control of the 'biased' domestic legal regimes of the developing countries. Many countries and most arbitral institutions have adopted legislations based on the UNCITRAL Model Law on International Commercial Arbitration, thereby making it the most universally accepted rules on international commercial arbitration.¹⁷

3 International Commercial Arbitration: The Claimed Superiority, the Reality and the Interest of the Developing Countries

One of the often cited technocratic advantage of arbitration are its -'predictability' with respect to the place, governing law, procedural rules, scope, parties, language, no jury, no appeal (finality), - tailored to the needs of the contracting parties, including confidentiality and selection of decision makers, with special qualification and expertise, speed and cost, simplified procedures, less discussion, less likely to be procedural, limited appeal etc.

But in reality all this claimed superiority over domestic courts are made up and is only a pretext to promote the western business interests. Not only this, because of the peculiar institutional set up, the international commercial arbitration is working against the interest of the developing countries. This could be revealed by an examination of the claimed superiority of arbitration one by one.

(i) *Quick settlement of trade disputes*: one of the claimed advantages of Arbitration is that it provides a quicker settlement of trade disputes than the court procedure offers, which is lengthy and time consuming. But in practice, this advantage no longer exists. Once the economic and political stake involved in the dispute grows, so does the time consumed by the arbitration to arrive at an award. Delay mechanisms and procedural intricacies are most ingenuously deployed.¹⁸

¹⁷ UN Doc. A/CN.9/428, 21 May 1996. India is one of the countries which have adopted the UNCITRAL Model Law, as it is.

¹⁸ See n. 6, p. 434.

(ii) *Arbitration offers an informal and cordial resolution of the Disputes:* This idea is also not true any more. The introduction of American Law firm model into the European market for legal services had led to the more aggressive and confrontational state of litigation, displacing the earlier conventional model.¹⁹

(iii) *Inexpensive settlement of trade disputes:* The institution of international commercial arbitration look more and more like a very profitable service industry. The cost involved in arbitration is quite startling when compared to cost of legal proceedings in developing countries.²⁰ The lack of qualified personals in the developing countries has also compelled the parties to hire western lawyers by putting up heavy cost. Despite the significant amount involved, little is known about the process for remunerating the arbitrator²¹ or the final overall cost.

(iv) *Settlement of disputes by experts:* Controversies arising from large scale international investment agreements are very complicated and therefore require arbitrators sufficiently familiar with technical and commercial background. But the reality is that an absolute majority of arbitrators are chosen from lawyers, law professors and judges. Most of the experts are summoned as expert witness, just as they would be in national court proceedings.²²

(iv) *Confidentiality:* This is the only advantage of arbitration. But confidentiality is nowhere guaranteed, because there is no provision with respect to this in any legal instrument. The High Court of Australia in *Esso Australia Resources Ltd. v. Plowman*,²³ decided to the effect that there is no implied contractual term as regards confidentiality.

Thus, the only advantage of arbitration appears to be its ability to provide a legitimate medium for the effective disempowerment of national legislative potentials. The question that automatically arises is why was then there a paradigm shift in the third world approach towards international commercial arbitration. The first and the foremost reason is the unequal bargaining power of the developing

¹⁹ Ibid., p. 335

²⁰ The International Chamber of Commerce charges US \$ 780,000 for dispute involving 100 million with three arbitrators.

²¹ John Yukio Gotanda, "Setting Arbitration Fee: An International Survey", *Vanderbilt Journal of Transnational Law*, vol. 34, no. 4, 2000, p. 2.

²² See n. 6, p. 435.

²³ (1995) 128 ALR 391.

countries in the internal trading regimes especially when they are the exporters of primary products. Secondly, the developing world is constrained to adopt a favorable posture, because “developing countries simply must accept arbitration if they are to attract any foreign investment.”²⁴ Thus an arbitration clause is a part-and-parcel of the legal package of economic development of the South.²⁵

3 Power of the Arbitrators

Under the UNCITRAL Model Law on Arbitration, the power vested with the arbitrator is enormous. This discretionary exercise of power has an adverse impact on the interest of the developing countries, especially when the majority of the arbitrators are from the west or western educated. This arbitrary power could be considerably reduced by agreement between parties. But with a disadvantage in the bargaining power, a party from the developing countries cannot always have his say in the contract.

The selection of the Arbitrators is the most crucial part of any arbitral proceedings because, any aspect of the institutional rule, which the parties have left to chance, is often left for the arbitrator’s discretion. As every contingency cannot be addressed in a contract, significant control may rest in the arbitrator’s discretion and judgment.²⁶ Under the Model Law an arbitrator can be appointed by agreement between parties,²⁷ the failures of which any party may request the court or other authority for the appointment of arbitrators.²⁸

(i) *Competence to rule its own jurisdiction*: Article 16 (1) of the Model Law adopts two important and most controversial principle of *Kompetenz-Kompetenz* and the principle of “Separability” or autonomy of the arbitral clause. The effect of *Kompetenz-Kompetenz* principle is to truncate the litigant’s ability to function as a self-contented whole, uninterrupted by public state intervention until the award is rendered.²⁹ On the other hand, the principle of “separability” provides a predetermined, mechanical separation of the arbitral

²⁴ See n. 10.

²⁵ See n. 6, p. 421.

²⁶ James M. Rhodes and Lisa Sloan, “The Pitfalls of International Commercial Arbitration”, *Vanderbilt Journal of Transnational Law*, vol. 17, 1984, p. 28.

²⁷ Article II (4), UNCITRAL Model Law, 1985.

²⁸ See n. 6, p. 439

²⁹ *Ibid.*

clause from the contract in which it was embedded, allowing for the perpetual jurisdiction of the arbitral tribunal to adjudicate all disputes arising from the contract – even if the contract in which it was agreed to arbitrate itself is found to be null and void.³⁰ The aim of this provision is to achieve a semi-judicial status of self-sufficiency that allows for immediate national recognition and enforcement of its awards.

(ii) *Power to determine procedural and substantive law applicable to the arbitration and contract:* An arbitration proceedings are conducted, in the absence of any agreement to the contrary, in accordance with the law of the country in which the arbitration is held.³¹ However, under the procedural law, the Arbitrator is given a large amount of discretion or power to determine the admissibility, relevance, materiality and weight of evidence. This power gives considerable discretion on the part of the tribunal which may determine the final outcome of the dispute.

The international commercial arbitration involves a foreign element which gives rise to question as to choice of law and the jurisdiction of court. It is usual for the parties to decide which law will govern the contract. The term ‘proper law of contract’ means the system of law governed or where their intention is neither expressed nor to be inferred from the circumstance, the system of law with which the transaction has the closest and most real connection.³² Here, even though the domestic courts in arriving at a conclusion have provided certain guidelines, the arbitrator is given great discretion to decide on the proper law of contract.³³

Similar is the case with proper law applicable to arbitration agreement. The validity, effect and interpretation of an arbitration agreement are normally the same or the proper law of the contract.³⁴ By the separation of the contract from the arbitration clause, the proper law applicable can also be separated unless otherwise agreed to by the parties to the contrary. This also has given wide discretion for the arbitrators to decide which law should govern the arbitration agreement. On the other hand, where the proper law is expressly

³⁰ Ibid.

³¹ Article 19, UNCITRAL Model Law of ICA, 1985.

³² Article 28, UNCITRAL Model Law of ICA, 1985.

³³ *National Thermal Power Corporation v. Singar Corporation*, AIR 1993 SC 998.

³⁴ A.K. Bansal, *Law of International Commercial Arbitration* (New Delhi: Universal Law Publishing, 1999).

chosen by the parties, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which though collateral or ancillary to the main contract, is nevertheless a part of such contract.³⁵

(iii) *The Place of Arbitration*: The place of arbitration also plays an important role in arbitration proceedings. It is important because it is the place of origin of the award and is relevant in the context of recognition and enforcement of proceedings and specifically in determining for the purpose of Article 36 (1)(a)(v), when the arbitral award may be refused if the parties proves that it has been set aside or superseded by the court of the country in which or under the law of which the award is made.³⁶

Another provision which gives arbitrators wide interpretative power is Article 28 (3) and (4) which speaks about the "*ex equo at beno*"³⁷ or "equitable arbitration" and "usages of the trade".³⁸ One effect of such an "equity clause" is to exclude any right to appeal against an award, as there is no point of law involved.³⁹ This also permits the tribunal to ignore express contractual wordings and reach a decision by applying general principles of fairness. Also in the case of "usages of trade" applicable to transactions, most of the usages are developed by the western commercial practices which could work against the interest of the developing countries because of the unequal position in international trade.

Thus, it can be seen that arbitrators are given considerable and unchecked discretionary power, unless limited from exercising it in case of an agreement to the contrary by the parties. An arbitration agreement which is the result of an unequal bargaining power; an arbitration tribunal, the composition of which is influence by the west; with vast discretionary power, is certain to work against the interest of the developing countries.

³⁵ See n. 34, p. 1008.

³⁶ UNCITRAL Secretariat Explanation of Model Law on International Commercial Arbitration, *UNCITRAL Yearbook*, vol. XVII1985.

³⁷ Article 28 (3) UNCITRAL Model Law, 1985.

³⁸ Article 28 (4) UNCITRAL Model Law, 1985.

³⁹ David Fraser, "Arbitration of International Commercial Disputes under English Law", 1998, available online at <<http://www.bakernet.com>>.

4 The Power of the Court to Supervise and Control

The power of the court to assist, intervene, supervise and control, and power of recognition and enforcement have been always controversial in the legal regime of international commercial arbitration. In the recent years there is a clear shift from the courts towards a philosophy of increasing *laissez faire* by allowing the arbitral process to become much more autonomous and free from judicial intervention.⁴⁰ The major factor for this is the pressure towards harmonization and virtual unification of national law and procedure concerning international commercial arbitration. Hence, UNCITRAL Model Law was drafted. But the crucial question is whether we could accept a regime without courts' intervention? Or can the court's power to set aside or review the award? It is in this context, we should examine the UNCITRAL Model Law, 1985.

The Model Law's first step to delimit the power of the court to set aside the arbitral award is by conferring the crucial terms such as 'arbitral agreement', 'commercial' etc., the widest possible meaning. Though the term 'commercial' is not defined, the Modal Law calls for a 'wider interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not',⁴¹ and the determinative test is not based on what the national law may regards as 'commercial'.⁴²

The Model Law envisages courts involvement in very limited circumstances. These instances include appointment (article 11, 13, 14), Jurisdiction of the arbitral tribunal (article 16), setting aside of arbitral award (article 34), interim measures of protection and recognition and enforcement of arbitral awards (article 35 and 36). Beyond the instance 'no court shall intervene in matters governed by this law'.⁴³

(i) *Appointment, Challenge and termination of the mandate of the Arbitrator*: If there exists a disagreement with regard to the appointment of the arbitrator, the party can request the court or other authority to appoint an arbitrator.⁴⁴ But once appointed there are only

⁴⁰ Michael Kerr, "Arbitration and the Courts: The UNCITRAL Model Law", *International and Comparative Law Quarterly*, vol. 34, 1985, p.5.

⁴¹ Footnote to Article 1, UNCITRAL Model Law, 1985.

⁴² See n. 37, p. 3.

⁴³ Article 5, UNCITRAL Model Law, 1985.

⁴⁴ Article 11, UNCITRAL Model Law, 1985.

limited grounds when the arbitrator could be removed. One such ground is with regard to his 'independence or impartiality'.⁴⁵ Conceptually there is a distinction between impartiality and independence. But under the English Arbitration Act 1996, only "impartiality" is a ground for challenging the appointment of arbitrator. The effect of this missing word is reflected in *AT&T Corporation v. Saudi Cables Corp.*,⁴⁶ where the commercial court rejected a post-award challenge based upon the alleged lack of independence of the Chairman of an ICC Arbitral Tribunal who failed to disclose this status as a non-executive director of a competitor of the claimant that had completed with claimant successfully to obtain the multibillion dollar intentional contract. In another case based on New York Convention, the US district court enforced the award even though the arbitrator appointed by plaintiff had been its counsel in at least two other legal proceedings.⁴⁷ The court held that even though the public policy generally favoured "full disclosure of any possible interest or bias, the stronger public policy in favour of the international arbitration must prevail to enforce the award."⁴⁸

(ii) *To decide the jurisdiction of the arbitral tribunal:* The arbitral tribunal's competence to rule on its own jurisdiction i.e., the very foundation of its mandate and power, is of course, subject to court control.⁴⁹ The challenge on jurisdiction, however, should be made within 30 days and the court's decision is not subject to appeal. Further, the arbitration tribunal has the discretion to continue the proceedings and make an award while the matter is pending with the court.

(iii) *Setting aside arbitral Award:* The Model Law contains an exclusive list of limited grounds on which an award may be set aside or challenged. The conditions of enforcement of an arbitral award are considerably more favourable to the party seeking enforcement.⁵⁰ And it is for the party who asks for non-enforcement to show cause why the award should not be enforced. The most important ground

⁴⁵ Article 12(2), UNCITRAL Model Law, 1985.

⁴⁶ Q.B. 1999.

⁴⁷ *Fertilizer Corporation of India v. IDI Management Inc.*, 517 F Supp. 948, cited in W. Michael Tupman, "Challenges and Disqualification of Arbitrators in IAC", *International and Comparative Law Quarterly*, vol. 38, 1989, p. 48.

⁴⁸ *Ibid.*

⁴⁹ Article 16, UNCITRAL Model Law, 1985

⁵⁰ See n. 14, p. 299.

for non-enforcement of arbitral award available with the court is the 'public policy' exception, which has to be narrowly constructed.⁵¹

(d) *Interim measures by the court:* The Court has the power to take interim measures on application by the party in limited number of instances including an interim injunction or such other measures of protection as may appear to the court to be just and convenient.⁵² The Indian High court in *Olex focas Pvt. Ltd v. Skoda Export Co Ltd*,⁵³ held that the Court have been vested with the jurisdiction and powers to grant interim relief in appropriate cases. But this case was with regard to the protection and preservation of the disputed property.

In another Indonesian case the Ad hoc international arbitration acting under the UNCITRAL Rules provided an interim award against the Indonesian State Electricity Corporation.⁵⁴ The claimant alleged that Indonesia is liable for the State entity's non-payment of the award. Within days after the service of the statement of claim, the State entity commenced an action in the Jakarta District Court to enjoin the arbitration proceedings of which the district court issued an injunction against the arbitration, including a prospective fine of US \$ one million per day for any violation of the injunction.

The Arbitration Tribunal reacted by referring to the writings of former President of the International Court of Justice (ICJ), Judge Arechaga, who stated that under international law "the judgment given by a judicial authority emanates from an organ of the State is just the same as law promulgated by the legislature or a decision taken by the executive". The Tribunal issued a procedural order stating that the injunction was violative of internal law; there was a breach of arbitration agreement and the physical venue was changed to The Hague. Finally, while delivering the final judgment, the Tribunal laid down the penultimate rule that in the absence of one arbitrator (here the Indonesian arbitrator was kidnapped) the other two remaining arbitrators could proceed with the case. The arbitrator relied on the writings of the Judge Stephen Schwebal, President of the ICJ, according to whom, withdrawal of an arbitrator without approval or authorization was wrong under customary international law and the general principle of law recognized and applied in the

⁵¹ *Renusagar Power Co, Ltd. v. General Electronics Co.*, AIR 1994 SC 860.

⁵² Article 9 UNCITRAL Model Law 1985.

⁵³ AIR 2000 Delhi 161.

⁵⁴ See *Himpurna California Energy Ltd. v. Indonesia*, and *Patua Poer Ltd. v. Indonesia*, 15 MEALEY's International Arbitration Report 1, 2000.

practice of international arbitration".⁵⁵ But the Tribunal never addressed the question where the authorization was impossible to obtain in this case.

5 Role of AALCO's Regional Arbitration Centres

The Asian-African Legal Consultative Organization (AALCO), realizing the importance of international commercial arbitration for the development of the developing countries, felt the need to improve the procedure of international commercial arbitration, the necessity for institutional support, develop necessary expertise and create environment conducive to conduct arbitration in the Asian and African regions.⁵⁶ This, it was expected, would "process and guide the future of international commercial arbitration in a manner which led to the creation of a '*lex mercatoria*'" which took into account the needs and concerns of developing countries.⁵⁷ While several countries had established national arbitral institutions and passed requisite legislation, the need to establish regional centres to fulfill the urgent needs for the Asian-African community of States was also felt.

Accordingly, the AALCO endorsed the recommendations of its Trade Law Sub-Committee that efforts should be made by Member States to develop institutional arbitration in the Asian and African regions and envisaged *inter alia* the establishment of a network of Regional Centres for Arbitration functioning under the auspices of the AALCO in different parts of Asia and Africa so that the flow of arbitration cases to arbitral institutions outside the Afro-Asian region could be minimized and as a viable alternative to the traditional institutions in the West.⁵⁸

⁵⁵ Marc J. Goldstein, "International Commercial Arbitration", *The International Lawyer*, vol. 34, no. 2, 2000, p. 10.

⁵⁶ B.S. Chimni, "AALCC's Regional Centre for Arbitration: Historical Context, Genesis and Functions", (1983), p.111. (Document is on the file of the author).

⁵⁷ *Ibid*, p. 112.

⁵⁸ See, the AALCO Secretariat study titled 'Integrated Scheme for Settlement of Disputes in the Economic and Commercial Matters', elaborated two basic objectives: first, to establish a system under which disputes and differences arising out of transactions in which both the parties belong to the Asian-African and Pacific regions could be settled under fair, inexpensive and adequate procedures. Secondly, to encourage parties to have their arbitrations within the region where the investment made or the place of performance under an international transaction was a country within this region. The conclusions made in the study were in favour of establishment of six sub-regions, namely East Asia, South-East Asia, West Asia, North Africa and West Africa. See AALCC, *Consolidated Report of the Seventeenth, Eighteenth and*

In pursuance of this, AALCO in cooperation with its Member States, established four institutions namely, Kuala Lumpur Regional Arbitration Centre (KLRCA) in 1978, Cairo Regional Centre for International Commercial Arbitration (CRCICA) in 1979,⁵⁹ Lagos Regional Centre for International Commercial Arbitration (LRCSCA), in 1980 and Tehran Regional Arbitration Centre (TRAC) in 1996.⁶⁰ Moreover, AALCO in cooperation with Government of Kenya is in the process of establishing a Regional Arbitration Centre in Nairobi.

The Regional Centres offer facilities and assistance for the conduct of arbitral proceedings, including the enforcement of awards made in the proceedings held under the auspices of the Centre. The Centres also adopted the Rules for Arbitration which was a modified and adapted version of the UNCITRAL Arbitration Rules of 1976. The parties also had the option to choose other methods such as Mediation and Conciliation. Apart from this, the Centre also render advisory services to parties to international commercial and investment contracts with regard to drafting of these contracts, promote arbitration and other ADR techniques through the organization of international conferences and seminars and organize training programs for international arbitrators and legal scholars from the Afro-Asian region.

Over the years, there has been considerable increase in the number of cases, both international and domestic, referred to these Regional Arbitration Centres. However, much needs to be done to achieve the desired objectives for which they were established.⁶¹ Measures should be taken by the private entities and the States in the

Nineteenth Sessions held in Kuala Lumpur (1976), Baghdad (1977) and Doha (1978) (New Delhi: AALCC, 1979).

⁵⁹ The Cairo Centre had also established the Institute of Arbitration and Investment in 1990; the Institute of Arab and African Arbitrators in Egypt in 1991; the Centre's Maritime Arbitration Branch in Alexandria, which is meant to deal exclusively with maritime disputes, in 1992; the Cairo Branch of the Chartered Institute of Arbitrators of London in 1999; and Alexandria Centre for International Arbitration in 2001.

⁶⁰ An Agreement was concluded between the AALCO and the Governments of Malaysia, Arab Republic of Egypt, Nigeria and Islamic Republic of Iran to establishment of a Regional Center for Arbitration. The Agreements recognized the status of the Centers as intergovernmental organizations and conferred certain immunities and privileges for their independent functioning.

⁶¹ See Samson L. Sempasa, "Obstacles to International Commercial Arbitration in African Countries" *International and Comparative Law Quarterly*, vol. 41, no.2, 1992, pp. 387-413; Amazu A. Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (UK: Cambridge University Press, 2001).

Asian and African region to support the Centre's activities by making them the primary institutions for arbitration. This could be done by including an arbitration clause for settlement of disputes under the arbitration rules of the Centres, not only in all contracts on behalf of the Government, public corporations and other Government undertakings, but also in contracts of private entities.

6 Concluding Observations

Thus, one thing that clearly emerges from the above discussion is that claimed advantages of the arbitration over the courts do not exist at a practical level, and the present setup is not favourable to the interest of the developing countries parties. For the international commercial arbitration to escape these challenges, it should dismantle the existing structure which is based on doctrines associated with neo-colonialistic efforts at the preservation of economic dominance and move towards more acceptable standards which seeks a balance between the interest of the North and the South. The present text of the Model Law goes too far in giving uncontrollable power to arbitrators, free from all checks and balances on unrestricted authority. There is not even a single provision which specifically deals with the liability of the arbitrator. The cases coming from various regional systems show that even "independence" of the arbitrator which is a fundamental rule, is dispensed with.

Not waiting for the overhauling of the entire system of international commercial arbitration, what the developing countries could do is to take steps to educate its business community the essential pitfalls in the international commercial arbitration. Also every effort has to be made to setup and promote regional arbitration centers, whereby the dominance of the western arbitral institutions can be dealt with. The Regional Arbitration Centres setup by the AALCO in Asia and Africa provide a relatively inexpensive and fair procedure for the settlement of international commercial disputes within the region. It is necessary that all efforts should be made for promoting these Centre's and such other institutions, if developing countries wish to make international commercial arbitration work for them.