International **commercial arbitration** and the Southern African **Development Community**

By Michael Tselentis QC*, London

Edited version of a paper given at a conference held in Mauritius in April 2007 under the auspices of the Arbitration Foundation of South Africa and the Mauritius Chamber of Commerce and Industry to explore the creation of a regional arbitral institute to serve the Southern African Development Community [http:/www.sadc.int/].

The Southern African Development Co-ordination Conference was founded on 1 April 1980, and was transformed into the Southern African Development Community on 17 August 1992. The members of the SADC are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

1 Introduction

The two presentations which we have just heard on the dynamics and future of the SADC[1] raise the question, how can those dynamics best be served by the proposed new regional arbitration institute? In particular, how can the new institute respond to the requirements and expectations as to dispute resolution, not only the SADC countries and their nationals and corporates, but also the international counterparties with which they deal?

At a conference which will debate the launch of a new international arbitration institute, it is appropriate to recall the following sentiments which accompanied the inauguration of the world's oldest major institute, the London Court of Arbitration (now the London Court of International Arbitration) in 1892:[2]

'This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peace-maker instead of a stirrer up of strife.'

These words are not without irony when viewed with the benefit of hindsight and developments in the field of international arbitration since they were uttered. While the debate as to the respective merits and demerits of arbitration and litigation has continuing relevance in the context of domestic disputes, where an effective choice exists for both parties between the national courts and domestic tribunals, in the context of international commercial disputes it is clear that opinion has shifted strongly and decisively in favour of international arbitration. The crucial factor in this regard has of course been the absence of an international court to deal with international commercial disputes. As noted by Jan Paulsson:[3]

'The fundamental problem that distinguishes international from domestic cases is the multiplicity of potentially competent jurisdictions. Since there is no obligatory 'World Court of International Commerce' parties must voluntarily accept a neutral forum created by means of a contractual stipulation. If such contractual stipulations are not respected from country to country, there would be chaos. Everyone would sue his adversary in his own favourite court. There would be inconsistent judgments, and those judgments would be difficult to enforce anywhere but in the country where they were rendered. The system would degenerate. Settlement of disputes under international contracts would no longer be secure. International commerce would suffer because serious companies would consider international contracts to be a matter of high risk, to be avoided or to be priced at a premium to compensate for the risk'.

And Dr Robert Briner, the then-Chairman of the International Court of Arbitration of the ICC, speaking at a conference in Sydney in 2002,[4] observed that in recent years almost all Central and East European States had created ICC National Committees, as had countries such as the Peoples' Republic of China and Mongolia, and that an increased participation in ICC arbitration had been noticed, inter alia, from a number of developing countries, including countries in sub-Saharan Africa. He said:

'There is an increased awareness that the growth of their economies also depends on the confidence of the foreign partner—the investor, the licencor, the trading or the joint venture partner. The rule of law is the basis on which all commercial interchange has to be able to rely. The confidence of all parties in a reasonable, foreseeable method for resolving disputes in a fair fashion, based on rules of law, constitutes an essential cornerstone for the development of international trade and investment.'

For the same reason, international arbitration has become an extremely popular method of resolving disputes under the ever-growing number of bilateral investment treaties (which now exceed 2400) and regional or multi-lateral treaties such as the North American Free Trade Agreement of 1993, and the 1994 Energy Charter Treaty, which generally allow investors to bring disputes before tribunals constituted under the Rules of ICSID or appointed on an ad hoc basis under the 1976 UNCITRAL Arbitration Rules. By allowing direct recourse by private complainants with respect to such a wide range of issues, those treaties have created a dynamic extension of arbitral jurisdiction in the international realm.[5]

In either case the underlying premise behind international arbitration is the same: effective investor protection (through an effective and neutral dispute resolution mechanism, in which both parties can have confidence) is a necessary pre-condition to the promotion of foreign investment and international trade. This proposition is of particular importance to developing countries, which may be viewed by investors in the developed world as relatively risky investment destinations, and which will therefore be acutely conscious of the truth of the observation of the first ICSID Tribunal in *Amco Asia v Indonesia*[6] that *'to protect investment is to protect the general interest of development and of developing countries'*.

2 The pertinent questions

These general observations raise three questions which are pertinent in the present context. First, what precisely do corporations

* Michael Tselentis QC (England and Wales), SC (South Africa), BCL (Oxon), BA LLB (Cape Town), Chartered Arbitrator, FCIArb, FAArb (SA), practises as a barrister and arbitrator in London as a member of 20 Essex Street Chambers (www.20essexst.com). He is also a member of the Johannesburg Bar, and a bencher of Gray's Inn.

involved in international trade and investment require in the form of dispute resolution systems, and precisely what attributes of such systems do they value? Secondly, what are the requirements and expectations of developing countries themselves in this regard? And thirdly, what useful lessons does all this contain for a new regional arbitral institute serving the SADC countries?

In addressing these questions, it must of course be borne in mind that many SADC countries will have important interests as investors in other SADC countries as well as being targets of inward investment. This is well illustrated by the fact that, for example, South Africa's inward foreign direct investment in 2004 was US $46.3 billion, whereas its total outward foreign direct investment was US $28.8 billion, and was mostly concentrated in the Southern African region, with South African firms making their largest foreign investment in Zimbabwe and Mozambique.[7] It is therefore necessary for SADC countries to approach these issues from a dual perspective.

3 The requirements of international corporates

The first of the three questions to which I have alluded, namely the requirements of international corporations as to dispute resolution, formed the subject-matter of an extensive survey into Corporate Attitudes and Practices in International Arbitration, conducted in 2005 by the School of International Arbitration, Queen Mary College, London, and sponsored by PricewaterhouseCoopers.[8] This was a study into the views of in-house counsel at leading institutions around the world conducted over a six-month period, in two phases: an on-line questionnaire completed by 103 respondents and 40 in-depth interviews. Of the corporations that participated in the study and that had been involved in cross-border transactions, 81% had had direct experience with international arbitration, transnational litigation, mediation and/or other ADR mechanisms. The geographical spread of the respondents was as follows: Europe 49%, Asia 30%, Americas 15%, Africa 3% and Middle East 3%.

Probably the most important finding of the study, for present purposes, is the fact that 73% of the corporations surveyed preferred international arbitration as a means of resolving cross-border disputes, either alone (29%) or in combination with ADR mechanisms in a multi-tiered, or escalating dispute resolution process (44%). ADR mechanisms as a stand-alone process were favoured by 16% of the corporations, while trans-national litigation was preferred by only 11%.

Consistently, most corporations insisted on the inclusion of an arbitration clause in their contracts, and multi-tiered or escalating dispute resolution clauses were found to be increasingly popular.

The main reasons for choosing international arbitration were flexibility of procedure; the enforceability of awards; the privacy afforded by the arbitral process; and the ability of the parties to select arbitrators with the necessary skills and expertise and who are well-suited to the appropriate legal and cultural context. Other advantages identified were cost; speed; the possibility of avoiding specific legal systems and national courts; and the neutrality of the arbitral venue.

The corporations that were prepared to rely on trans-national litigation alone tended to fall into one of two categories: first, corporations that operate principally in developed countries, where they believe that they will have access to an independent, impartial judicial system: and, secondly, corporations from developing countries that may be inexperienced with and apprehensive about the arbitral process and feel more comfortable resolving disputes in their own court systems.

Respondents also identified their concerns at various perceived disadvantages of arbitration, which included the expense of arbitration, the time taken from filing to award, national court intervention, the lack of an appeal structure and the lack of third party mechanisms.

However, the majority of counsel interviewed stated that the success of the New York Convention compensated for failures in cost and time.

Legal considerations were the single most important factor for a corporation's choice of venue for international arbitration proceedings, but convenience was a surprisingly close second. 91% of respondents favoured the finality of arbitration awards, viewed this as a vital attribute, and rejected the idea of an appeal mechanism.

As to the preferred arbitral forum, 76% of respondents opted for institutional arbitration, with the top-ranking institutions of choice being the ICC, the LCIA and the AAA/ICDR. The 24% opting for ad hoc arbitration were primarily larger corporations with a gross annual turn-over of more than US$5 billion, which had greater experience of international arbitration, and large, sophisticated in-house legal departments with experience of managing arbitration proceedings.

The most widely-recognised reason for choosing institutional arbitration was a strong reputation for managing arbitration proceedings, scoring more than the second and third most common reasons (familiarity with proceedings, and an understanding of costs and fees) put together. The convenience of the process was a fourth reason given.

A sizeable number of respondents were supportive of the development of stronger 'regional' arbitration institutions. Indeed, some 15% of the respondents expressed a preference for 'regional' arbitration institutions, specifically SIAC (Singapore International Arbitration Centre), JCCA (Japan Commercial Arbitration Association), CANACO (Camara Nacional de Comercio—Mexico), ACICA (Australian Centre for International Commercial Arbitration) and CRCICA (Cairo Regional Centre for International Commercial Arbitration). Many corporations expressed an interest in institutions closer to the location of the dispute, which might also be less expensive than established institutions, but qualified this interest by emphasising the need for such institutions to demonstrate a proven track record.

Another finding of interest to regional institutions is that in-house counsel generally favour appointing an arbitrator with specialisation or expertise in the subject-matter of the dispute. They also increasingly seek:

- Specialisation in industry sector
- Regional or country experience
- Cross-disciplinary expertise (eg technical or financial background) which may be useful for the quantification of damages or understanding relevant market conditions)

Generally, the outlook for international arbitration is extremely positive, 95% of respondents expect to continue using it, and a rise in arbitration cases is expected.

4 The requirements and expectations of developing countries

Against these findings, it is possible to address the second question, namely what are the requirements and expectations of developing countries (particularly those in Africa) in regard to the resolution of international commercial disputes in which they are involved?

In his ground-breaking study, *International Commercial Arbitration and African States*, [9] as well as in various articles,[10] Dr Amazu A. Asouzu of King's College, London, identified the main issue as being the perception and concern of developing nations that the international arbitral process is a system which operates to their disadvantage in a number of respects, which include:

- The fact that the preferred venues for resolving international disputes involving developing nations predominantly take place outside their jurisdictions, generally in far off locations on other continents.
- The choice or appointment of international arbitrators or conciliators, and the dearth of experienced arbitrators and conciliators in their countries.
- The expense of dispute resolution at the traditional international venues.
- The suspicion and lack of confidence by parts of the developing world in the international commercial arbitral process, stemming from wide disparities between their cultural, legal and economic systems, and levels of economic, legal and political developments.

There is considerable justification in all these points, which reflect the undoubted need for a credible and reliable system for the adjudication of international commercial disputes on a regional level. As Jan Paulsson wrote in a paper quoted in Dr Asouzu's book:[11]

'In asking for a situs of arbitration in his region, the Third World negotiator is in many cases being perfectly reasonable. When the entire centre of gravity of an investment contract - from its negotiation to its performance - is in an African country, and it resulted in the creation of an enterprise whose physical plant, corporate records and personnel are located in that country, the concept of arbitration in Europe or North America may be not only artificial, but truly burdensome'.

It was concerns such as these that led the Asian-African Legal Consultative Council to set up a system of regional arbitral centres, operating on the basis of modified UNCITRAL Arbitration Rules, in Kuala Lumpur (1978), Cairo (1979), Lagos (1989), and Tehran, with further centres currently being planned for Qatar and Kenya. The focus of the AALCC dispute resolution scheme is to correct the perceived imbalance in the existing international arbitral order, and to develop the arbitral and ADR processes in the developing states, through the development of competent arbitral institutions.[12] Among the facilities offered by these regional centres is the arbitration of investment disputes, in terms of co-operation agreements between the regional centres and ICSID.

Although they function on a regional level, these centres exercise a global jurisdiction, in the sense that they are not restricted only to AALCC member states or to their nationals or only to those within any particular region. The host states to the regional centres are all parties to the New York Convention and have adopted the UNCITRAL Models for arbitration and conciliation as their respective national legal framework for arbitration and ADR.[13]

The available evidence indicates that these regional centres function well, and have gone from strength to strength. The Cairo Centre, which was one of the regional centres which was mentioned favourably by respondents in the Queen Mary College survey, has extended its activities from cases where one or both parties were African or Asian (and non-Egyptian), to cases where both parties are from outside the Afro-Asian region.

Equally, the Kuala Lumpur institute regularly administers arbitrations involving parties from outside the Asian region, and by 2000 had administered arbitrations involving some 30 nationalities.

In addition to the AALCC initiative there are other examples of regional arbitral centres which have been highly successful in recent times, such as Singapore and Hong Kong. The success of these institutes results from the effectiveness of the institutes themselves, but also a local judiciary which is highly supportive of arbitration, and a national legislative framework which gives full effect to those twin pillars of modern international commercial arbitration, the UNCITRAL Model Law and the New York Convention.

5 Implications for a new arbitral institution

What are the implications of these expectations and requirements—of investors and developing countries alike—as concerns the proposed new arbitral institute? I suggest that three main conclusions are warranted.

First, the creation of an international arbitral institute operating in the SADC countries will respond positively to the requirements and perceptions identified by Dr Asouzu, and to the increasing interest shown in regional arbitral institutes by the international investing public. In a world where it is a fact of life that international arbitration is the accepted method for resolving international business disputes, the creation of such an arbitral institute will not only address a clear need, but is in fact long overdue.

Secondly, as far as international acceptance of a new body is concerned, much will depend on the profile and expertise of the administering body. In his recent judgment in *West Tankers Inc v RAS Riunione Adriatica di Sicurti SpA and Others (The 'Front Comor'),*[14] Lord Hoffmann referred to the '*unobtrusive effectiveness of the supervisory jurisdiction'* along with neutrality and the availability of legal services as being the three criteria which determine the parties' choice of the situs and governing law in international arbitration, and this statement is confirmed by some of the findings in the Queen Mary College study. The supervisory jurisdiction is, of course, a function both of judicial supervision under the arbitration legislation of the situs, and the administrative supervision of the arbitral institution in charge of the case, and in this regard the new institute will be fortunate in that it will not have to start from scratch, but will be able to build on the demonstrated expertise, experience and resources of the Arbitration Foundation of South Africa as an arbitral body. Among the tasks that will face the new body is the creation of a pool of practitioners skilled in modern international arbitration practice, an essential pre-requisite to becoming a recognised centre for international commercial arbitration.

Thirdly, it is equally important that the new institution is able to present itself as a body that offers arbitral facilities in countries which are up to speed in terms of domestic legislation regarding international arbitration, and in particular legislation which gives full effect to the twin pillars of modern international arbitration, the New York Convention, and the UNCITRAL Model Law. As to the latter, the UNCITRAL web-site indicates that it is only Madagascar, Zambia and Zimbabwe of all the SADC countries that have enacted legislation based on the UNCITRAL Model Law. South Africa has not yet done so, despite the recommendations of the South African Law Commission in 1998, and its arbitration legislation continues to contain provisions which, as the Law Commission noted,[15] expose parties to an arbitration with a South African situs to the risk that the arbitration process may be derailed or retarded by an inappropriate resort to the courts prior to or during the course of the arbitration. It is critical to the development of international commercial arbitration in South Africa that the recommendations of the Law Commission as to international arbitration should now be implemented, and the notions of party autonomy and minimal judicial intervention be seen to be the cornerstones of international arbitration in South Africa as they are elsewhere. It is of course equally important that other possible venues for international arbitration in the SADC countries under the auspices of the new institution, such as Mauritius, should do the same.

Endnotes

[1] Presentations on the dynamics of the SADC and its future were given by Veepin Bhowon of Mauritius and Kgomotso Moroka SC of South Africa.

[2] Alan Redfern and Martin Hunter ***Law and Practice of International Commercial Arbitration*** 4 ed (London, Sweet and Maxwell, 2004) 4-5.

[3] Jan Paulsson 'Accepting International Arbitration in Fact--and Not Only in Words' in Cotran and Amissah (eds) ***Arbitration in Africa*** (The Hague, Kluwer Law International, 1996) 33.

[4] 'The Changing Landscape of International Commercial Arbitration' (Winter 2002) 19 (2) Winter ***News from ICSID*** 13.

[5] Jan Paulsson 'Arbitration without Privity' (1995) 10 ***Foreign Investment Law Journal*** 233.

[6] 4 ICSID Reports 344-5, para 39.

[7] Luke Eric Peterson 'South Africa's Bilateral Investment Treaties, Implications for Development and Human Rights' ***Friedrich Ebert Stiftung*** (November 2006) 8.

[8] A copy of the study can be found on the PWC website: http://www.pwc.comExtweb/pwcpublications.nsf/docid/0B3FD76A8551573E85257168005122C8 The full academic report entitled **'**International Arbitration – Corporate attitudes and practices. 12 perceptions tested: Myths, Data and Analysis Research Report**'** by Professor Dr Loukas Mistelis is published in (2004) 15 ***The American Review of International Arbitration*** 525-591.

[9] Amazu A Asouzu ***International Commercial Arbitration and African States (***Cambridge University Press, 2001)

[10] See, in particular, Dr Amazu A Asouzu 'Some Fundamental Concerns and Issues About International Arbitration in Africa' (2006) 1 ***African Development Bank Law Development Review*** 81-98.

[11] Page 64, fn 53.

[12] 'Some Fundamental Concerns and Issues about International Arbitration in Africa' 87.

[13] 'Some Fundamental Concerns and Issues about International Arbitration in Africa' 93.

[14] [2007] 1 Lloyds Rep 391 (HL).

[15] South African Law Commission Report 'Arbitration: An International Arbitration Act for South Africa', July 1998, para 1.15. See also RH Christie QC 'Arbitration: Party Autonomy or Curial Intervention' (1994) 111 ***SALJ*** 143-151, 360-372, 552-568 for an analysis of the main shortcomings in the Arbitration Act 42 of 1965.