

ARBITRATION AND MEDIATION IN ASEAN: THE LAW AND PRACTICE, BRUNEI DARUSSALAM

DR COLIN ONG*

Mediation in the context of the formal mediation processes is not a form of dispute resolution that is commonly employed by disputing parties in Brunei Darussalam. Whilst there are cases where mediation has been successful in a small instance of known cases, many of these mediations seem to break up even before any conclusions have been reached by the appointed mediator and the party most aggrieved will usually race to the courts to take up his position as Plaintiff and file an action against the other party(s).

Arbitration on the other hand tells a different story altogether and is fast becoming a popular form of dispute resolution mechanism in Brunei Darussalam. This also appears to be the case with some of the other ASEAN countries wherein arbitration is becoming the popular alternative.

There is no doubt that arbitration is fast becoming the acceptable choice of dispute resolution process by both domestic and international investors who deal with national Governments, as well as private commercial parties within the ASEAN region.

Arbitration is in fact not a recent concept of dispute resolution for commercial transactions and has been making great in-roads into the ASEAN region. Lord Mustill has stated that

“Commercial arbitration must have existed since the dawn of commerce. All trade potentially involves disputes, and successful trade must have a means of dispute resolution other than force. From the start, it must have involved a neutral determination, and an agreement, tacit or otherwise, to abide by the result, backed by some kind of sanction. It must have taken many forms, with mediation merging no doubt into adjudication. The story is now lost forever. Even for historical times, it is impossible to piece together the details, as will readily be understood by anyone who nowadays attempts to obtain reliable statistics on the current incidence and varieties of arbitrations. Private dispute resolution has always been resolutely private.”¹

The main desirability on the part of the foreign investor is to avoid having its case determined in a foreign judicial forum. Apart from the unfamiliarity with the jurisdictions language, procedures, and evidentiary rules, there may also be

* Managing Partner, Dr Colin Ong Legal Services, Advocates & Solicitors, Brunei Darussalam; Barrister of Essex Court Chambers and 3 Verulam Buildings, London. The views expressed in this article are purely those of the author's alone and are not necessarily those of his Law Firm or Chambers. The author thanks his colleagues for their assistance in discussing some of the ideas in this article. All mistakes and errors remain solely with the author.

¹ See Mustill, Arbitration: History and Background (1989) 6 Journal of Int. Arbitration 43.

other fears such as the perception of a disadvantage of having to appear before an unknown court structure and the possibility of nationalistic bias by the judges who may be less protective of foreign interests. On the other hand the national Government involved may also prefer to have the dispute settled quietly, privately and not in the full gaze of the public or the media.

The Brunei Arbitration Act 1994, (CAP 173) is based on the English Arbitration Act 1950 and not the United Nations Commission on International Trade Model Law on International Commercial Arbitration (UNCITRAL Model Law)². Traditionally, many of the statutory laws of Brunei Darussalam are based upon English Acts. As such and in the light of the English Arbitration Act 1996, it is not certain if there are any plans to update the Brunei Arbitration Act to adopt that of the new English Act or for Brunei to adopt the UNCITRAL rules which seem to have been adopted by many of the other ASEAN countries.

Part III of the Brunei Arbitration Act 1994 (“The Act”) deals with Domestic Brunei Arbitrations while Part IV of the Act deals with Enforcement of the New York Convention 1958 awards. Section 2 of the Act makes it clear that Brunei adopts the consistent approach of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). There must be an agreement in writing to submit present or future disputes (whether contractual or not) to arbitration and the term “agreement in writing” has been drafted to include exchange of letters, facsimiles or telegrams.

This definition of writing adopted by the Brunei Act is broader than what has been laid down in Article II(2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. However, the Brunei Act also does not encompass electronic data messages. It remains to be seen whether Brunei Arbitrators and ultimately the Brunei Courts in upholding or enforcing arbitral awards will take a wider interpretation of the term in writing. The difficulty with electronic messages and electronic data is that there is often no real guarantee to confirm that parties have received the electronic messages especially with the “reliability” of the sole ISP provider in Brunei Darussalam which has been the recipient of many complaints. As such, it is unlikely that Brunei Arbitrators will accept electronic data communication as capable of being construed as writing, unlike the position taken by other more developed arbitration jurisdictions³.

This requirement of having the parties agree in writing to submit present or future differences to arbitration is the cornerstone of the New York convention. It is therefore the Brunei position that, in the event that there is no specific separate arbitration agreement or arbitral clause, such an agreement may still be found in an exchange of correspondence between the parties as long as the written

² See, Colin Ong, Brunei Darussalam chapter in “Dispute Resolution in 30 Jurisdictions worldwide 2003”, for a general overview on arbitration and the litigation system in Brunei Darussalam.

³ This position would however be likely to change in the near future, as it is inevitable for there to be improvements to internet based services in both Brunei and the ASEAN region as a whole. See Neil Kaplan QC, “Is the need for Writing as Expressed by the New York Convention and the Model law out of step with commercial practice?” (1996) 12 *Arbitration International* 27.

agreement reflects a consensus ad idem in the parties intention to effect an arbitration agreement for settlement of disputes.

It is submitted that with the renewed vigour of integration amongst the ASEAN countries and even the formation of a new Free Trade Area involving ASEAN-China and other East Asian countries, the time is now ripe for the ASEAN to revive the idea of having a multilateral ASEAN convention for the recognition of foreign intra-ASEAN commercial judgments⁴ or to harmonise the collective commercial laws in the longer term. This will however take time to develop and have a draft Convention worked upon and agreed by the 10 ASEAN countries. It is submitted that there is no real substitute for such a harmonised Convention if the ASEAN member states are serious in enhancing closer intra-ASEAN trade integration and co-operation within the Free Trade Area. There must be a clear regime designed to resolve civil commercial disputes which may arise and not necessary be of a contractual nature but may involve tortious or restitutionary issues.

In the interim period, the usage of arbitration as a means of dispute resolution is very desirable as a means to resolve commercial disputes between contracting parties of the ASEAN. Although arbitration is hampered from being restricted to the necessity of an express agreement in writing between the contracting parties and it cannot cover areas such as competition law, dissolution of companies, insolvency, intellectual property rights and rights in rem, at least there is an avenue for dispute resolution for contracting parties from different ASEAN countries who wish to go into business with each other.

Most of the ASEAN member countries are already signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958. The New York Convention and the guidelines built into it assist in making the award decision making process internationalised and this will lead to an award that can be enforced both within the New York Convention signatory countries within ASEAN as well as internationally.

The Brunei Arbitration Act provides that unless a contrary intention is expressed, every arbitration agreement, shall be to a single arbitrator. In the event that the parties fail to reach agreement on the appointment of the arbitrator, either party may make an application to the High Court to appoint an arbitrator where the parties are unable to agree on the appointment of an arbitrator or where an appointed arbitrator refuses to act or is incapable of acting or dies.

This position adopted in the Brunei legislation takes an divergent view to Article 5 of the UNCITRAL Arbitration Rules which provides that if parties have not previously agreed on the number of arbitrators, then after a period of 15 days from the date of receipt of notice of arbitration by the respondent, three arbitrators shall be appointed.

⁴ See proposals by Puificacion Valera-Quisumbing, "ASEAN Legal Cooperation: Quest and Challenge", 1 ASEAN Law and Society Journal (1986); Sudargo Gautama, *Hukum Perdata Internasional* (2nd ed, 1986) and Colin Ong, "Cross-Border Litigation within ASEAN (1997, Kluwer Law International).

In Brunei Darussalam, domestic and international contractors and international investors who enter into contracts almost always select an arbitration clause to be inserted in lieu of a choice of court jurisdiction clause where the counter party is the Government of Brunei Darussalam. The reason is mainly of a historical nature but under the laws of Brunei, the Government is immune from suit before the Brunei Courts. An arbitration process is therefore the main and often only means for both parties to resolve their disputes. Having stated that, the attraction of arbitration is universal and it also appears to be the case that investors in other ASEAN countries also prefer to have arbitration as the selected form of dispute resolution as opposed to subjecting before the national courts of the country involved.

Article 4 of the Brunei Act provides that an arbitrator who has been validly appointed has an irrevocable authority to act except by the leave of the High Court. Section 33 of the Act endows the Brunei High Courts with the power to remove an arbitrator if the arbitrator has misconducted himself or where the arbitration award has been improperly procured. Section 34 of the Act gives the Brunei High Court the power to give relief and revoke the authority of an arbitrator if he is found to be or may not be impartial. The Brunei High Court is obliged to satisfy itself first that there exists sufficient evidence or grounds for the Court to revoke the arbitrator's authority.

There are no specific rules or any written guidelines within the Brunei Act for any substantive requirements for the procedures to be adopted in arbitration. It is generally left to the parties to select and agree on what rules of procedure are to be adopted and what will govern the arbitration. In the event that parties are unable to amongst themselves agree upon a set of procedural rules or where no express provision has been laid down in the arbitration agreement, it will then be for the arbitrator to himself decide the procedural rules and evidential matters to be adopted.

This lack of procedural rules can be looked at as a good thing in as far as the promotion of international arbitration is concerned. Parties who do not wish to be constrained by rigid procedural rules can agree to adopt rules of procedure that they are willing to be bound by. In most instances, parties to an arbitration in Brunei Darussalam have accepted the UNCITRAL rules of procedure as the governing rules⁵.

In as far as evidentiary rules are concerned, there seems to have been more of a difficulty especially where one party is from a Civil law system country and the other is from a Common law system country. There is generally no difficulty for purely domestic Brunei arbitrations, where the Brunei Evidence Act⁶ is generally adopted by Brunei arbitration practitioners but there can be difficulty where the arbitration is of an international nature.

⁵ See Hans Van Houtte, "Conduct of Arbitral proceedings in Essays on International. Commercial Arbitration edited by Sarcevic." Although this article focusses upon the virtues of the model law, it extols the ideals of flexibility in International Commercial Arbitration.

⁶ Evidence Act, (Chapter 108, Laws of Brunei Darussalam)

Generally, if counsel for opposing parties are Bruneian, they are more partial to agree to adopt Brunei Court processes. Although there is a degree of relaxation over the strict of Supreme Court rules of procedure and evidence, there is sometimes not enough relaxation over such rules. While the author would prefer to adopt the IBA (International Bar Association) Rules on the Taking of Evidence in International Commercial Arbitration 1999, this set of evidentiary rules are still not the norm for parties who are based or are domiciled in Brunei Darussalam⁷. It is submitted that perhaps this area of evidentiary rules may be a subject of interest to the ASEAN member states to examine into in detail and perhaps come up with a simple unified code that is acceptable to the majority of the member states⁸.

The Brunei Act is silent and does not provide any express rights for a party to make an application to Brunei High Court in the event that the party is dissatisfied over the procedure that has been adopted unless the party aggrieved applies to remove the arbitrator on grounds of misconduct.

The Brunei Act allows very limited grounds for the Brunei court to intervene during an arbitration⁹. Section 29 of the Act allows a Court to have jurisdiction to determine any question of law arising in the course of the reference where both the arbitrator has consented or where all the other parties have consented. There is no distinction made here between domestic Brunei or International arbitrations. This position is similar to the old positions which existed in some of the other ASEAN member states before and may be a disadvantage in attracting Brunei as a forum for International Arbitration.

Section 32 of the Brunei Act allows a Court to remit matters for the reconsideration of the arbitrator or umpire¹⁰. Finally, Section 34 of the Act gives the High Court power to revoke the authority of an arbitrator or umpire and declare an arbitration agreement to cease to have effect where an allegation of fraud has been raised by one party to the agreement against the other.

One of the drawbacks of the existing Act is that currently, arbitrators do not have powers to grant interim or conservatory relief unless parties have specifically agreed in writing at the outset that the tribunal has the right to grant interim orders. The Respondent who is usually the party resisting the arbitration is almost always reluctant to agree to grant the arbitrators such powers as these powers are usually deployed against him¹¹. Furthermore, an arbitrator in Brunei

⁷ The alternative being the Model Law. However the Model Law allows for Court assistance only for arbitrations whose seat is in a Model Law country.

⁸ See Brian King and Lise Bosman, "Rethinking Discovery in International Arbitration: Beyond the Common Law/Civil Law Divide" (Spring 2001, ICC International Court of Arbitration Bulletin Vol. 12/No.1).

⁹ The Brunei Courts tend to stay cases which are brought before it in defiance of an agreement to refer disputes to arbitration unless of course, there is not really a "dispute" between the parties. See decision of Justice Datin Hayati in HCCS 37 of 2000, *Ematco Sdn Bhd v. United Engineers (B) Sdn Bhd* [2000] Judgments of Courts of Brunei Darussalam 44.

¹⁰ Section 33 of the Brunei Arbitration Act allows a Court to remove an arbitrator or umpire and to set aside an award if he has misconducted himself or the proceedings or where the award has been improperly procured.

¹¹ A party can however, with the leave of the arbitrator, apply for the preservation, interim custody or sale of any good which are the subject matter of the reference under Section 17(6)(e) of the Brunei Arbitration Act.

does not have any power to compel the attendance of any witness to give evidence or produce non-privileged documents, even where the witness may be within the control of one of the disputing parties to the arbitration¹².

Although the Brunei Act does not specifically stipulate the format of the award, the general adopted international practice under the New York Convention requirements are generally observed in all arbitrations. As arbitrators are keen for their awards to be internationally enforceable in New York Convention states, the award is usually drafted in a clear and reasoned manner with both the facts, procedures taken and established legal principles stated clearly in the reasons for award.

The arbitrator will be expected to date and sign the award in order to allow the parties under the award to be certain of their rights and obligations which are capable of being performed¹³.

Part IV of the Brunei Act governs the enforcement of Convention Awards and Section 44 of the Act specifically provides that Convention Awards shall be enforceable either by action or in the same manner as the award of an arbitrator (domestic) is enforceable by virtue of section 36. This will of course be subject to the production and satisfaction of evidence of the award¹⁴ as well as the usual exceptions allowing refusal of enforcement that are found in the Article V of the New York Convention and also replicated in Section 46(2) of the Brunei Arbitration Act.

The Brunei Courts will apply the Arbitration Act to uphold New York Convention awards unless there are very clear reasons to the contrary. The Brunei legislation allows parties with limited grounds to appeal an award to the court. At the outset it is clear that there is no right to appeal to the court on a question of fact. A dissatisfied party may only challenge an award by either making an application to set aside the award or by making an application to the High Court to remit the award to the arbitrator for further consideration. Generally parties will only attempt to challenge an award on the grounds that there has been a serious irregularity in the proceedings or a point of law.

Any appeals on a point of laws will require the agreement of all the other parties to the proceedings or the leave of the court. There has not been any cases reported where a Dissatisfied Party has been successful in alleging that the arbitrator/tribunal has misconducted themselves technically by failing to observe

¹² An arbitrator only has the limited right to draw adverse inference against the party who has control of the witness sought for by the other party. The other party could then try to seek the court's assistance under Section 17(4) of the Act to sue out a writ of subpoena ad testificandum to produce witness or subpoena duces tecum to produce documents. This application will be subjected to a strict test for the applicant to prove the materiality of the witness in disposing of the case justly outweighs the objections of the objecting party.

¹³ Section 32(2) of the Brunei Arbitration Act also makes it a statutory requirement for the arbitrator to make his award within 3 months of the date of a High Court Order where an award is remitted to an arbitrator by the High Court.

¹⁴ Section 45 of the Brunei Arbitration Act requires the production of a duly authenticated original award or a duly certified copy; the original arbitration agreement or a duly certified copy of it; and a certified translation by a diplomatic agent where the award or agreement is in a foreign language.

the basic principles of natural justice or failing to give the appearance of impartiality.

Apart from the statutory rights provided by the Brunei Act to appeal to the Court, dissatisfied parties are also able to use common law principles including where there is a serious error of law apparent on the face of an award or where newly discovered material evidence, which could not have been reasonably discovered before the award was made, has since surfaced; or where the arbitrator has dealt with a matter which was not submitted to him.

Brunei Darussalam at present does not have its own arbitration centre and as such all arbitrations are conducted on an ad hoc basis or where institutionalised arbitrations are sought for arbitrations are referred to either the KLRCA or the LCIA and the ICC. Increasingly, due to considerations of costs of arbitration, accommodation, distance and quality of international arbitrators, parties and counsel¹⁵ tend to favour referring international disputes to the Kuala Lumpur Regional Centre for Arbitration (“KLRCA”) which was established in 1978 under the auspices of the Asian-African Legal Consultative Committee (AALCC).

Until such time that Brunei Darussalam decides to set up its own arbitration centre, it is envisaged that an increasing amount of arbitration agreements within international joint venture agreements drafted in Brunei Darussalam will select the KLRCA over the LCIA as the choice of institutionalised arbitrations.

It is hoped that Brunei Darussalam will also have its own domestic and international arbitration centre in the not too distant future.

Some suggestions for the ASEAN countries to consider in increasing the attraction of arbitration within the region

As the AFTA intends to encourage the facilitation of free movement of goods, services and capital¹⁶, a common conception and application of arbitration rules can make arbitration the prime dispute-resolution mechanism within the region until such time as the ASEAN can agree upon a draft Convention for harmonising their civil and commercial law judgments.

There are ongoing developments in the rest of the world in the field of arbitration and this ongoing development can be linked to the United Nations

¹⁵ Apart from costs, this selection process of choice of arbitral seat is not surprising since the majority of senior practising lawyers in Brunei are Malaysian nationals and until recently, formed the majority of the practising lawyers. To date Malaysian lawyers make up exactly 40% of the total of all practising lawyers in Brunei. They generally feel more comfortable with having arbitrations referred to Kuala Lumpur due to familiarity with the systems and statutory laws which are almost in pari materia with the Brunei laws.

¹⁶ Marcus Boeglin, "The Use of Arbitration Clauses in the Field of Banking and Finance: Current Status and Preliminary Conclusion." (September 1998, *Journal of International Arbitration*), where the author outlines how the traditional reluctance of bankers and financial institutions to utilise arbitration, is gradually changing and the increasing acceptance of arbitration in this field.

itself¹⁷ which has been looking at areas of development for international commercial arbitration.

The ASEAN authorities may wish to develop commercial arbitration within their member states in various ways. They could consider agreeing a protocol with respect to some arbitration rules such as to the usage of the telex, facsimile, electronic e-mails, multiparty teleconferences as a means to speed up and make the process of arbitration more use friendly¹⁸. With all the rage for internet based services amongst private entities and E-government formats amongst governments, this area should be a fruitful area for discussion.

The ASEAN authorities may also wish to look into suggesting uniform rules for the implementation of the enforcement part of the New York Arbitration Convention to avoid diverse conclusions that can be reached by courts who are asked to enforce an arbitral award. This will avoid the uncertainty as to how an award is to be interpreted in one ASEAN member state and avoid criticism that goes as far as to suggest that the New York Convention itself needs to be amended to reflect the current realities of the international commercial arbitration processes¹⁹.

It would be beneficial if the ASEAN could jointly agree upon basic practices to be adopted and applied in cross-border issues which concern arbitration between disputing parties within 2 different ASEAN states. Some suggested issues which may fall under such a protocol are:

1. Arbitration process within the ASEAN to be recognised only where Arbitration agreement is in writing and a definition of writing;
2. Where there is a written agreement to submit to arbitration, this must be respected and honoured by all ASEAN countries. ASEAN courts are to respect the cardinal principal rule of staying litigation before the courts in view of or pending resolution of the arbitration²⁰. The ASEAN Courts should not use the public policy loophole to ignore the provisions of the need to decline jurisdiction in the light of the arbitration agreement;
3. If a party to the arbitration is an ASEAN member state or quasi-government entity, it cannot rely upon its own laws solely to

¹⁷ For example, See Note by the Secretariat, United Nations General Assembly - Commission on International Trade Law (Thirty-second session, Vienna, 17th May - 4 June 1999) "Possible future work in the area of international commercial arbitration."

Web link: <http://www.uncitral.org/english/sessions/unc/unc-32/acn9-460.htm>

¹⁸ The author shares the views taken by Dr. Pierre A. Karrer, President of the Association Swiss De L'Arbitrage, that these and other means of efficient communication ought to be generally adopted for usage in arbitrations.

¹⁹ Thomas Carbonneau, "Debating the Proper Role of National Law Under the New York Arbitration Convention." (Spring 1998 vol 6. Tulane Journal of International and Comparative Law). This author looks at the different conclusions about the role of US domestic law in the New York Convention's Enforcement framework in both Chromalloy Aeroservices v. Arab Republic of Egypt, 939 F. Supp. 907 (D.C. Cir. 1996) and Algahanim & Sons v. Toys "R" US, 126 F.3d 15 (2d. Cir. 1997).

²⁰ Article II(3) of the New York Convention states that "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

- contest its capacity to be bound to the arbitration or the arbitrability of subject matter for the arbitration²¹;
4. ASEAN Courts to give assistance in taking evidence as well as giving assistance to giving force to interim measures protection that are ordered by arbitrators with an ASEAN state. This will give arbitration tribunals the much needed teeth and increase the desirability of arbitrating in a tribunal whose seat is located in an ASEAN member state²².
 5. Although parties do often include a choice of law clause into the agreements that they enter into, the concept of mercantile law as a substantive law otherwise called *Lex Mercatoria* is also capable of being used to arbitrate technical commercial disputes²³. An arbitrator(s) may decide upon themselves that a contract is not to be governed by a national law but by international norms and rules. This can take place in the event that the contracting parties had agreed upon applying international standards and rules to their contracts or, in the absence of a designation of specific laws or rules to adopt. There is always a possibility that in such instances the contract may be subjected to an international standard of laws and norms which is different to the domestic norms and rules of a single country. The *lex mercatoria* can then be applied and references can then be made to general principles of law and rules. Professor Berger favours the usage of the usage of applying *Lex Mercatoria* principles as a third legal system alongside domestic law and public international law. An older alternative position was taken by Lord Mustill who has criticised the usage and application of *lex mercatoria* principles²⁴.
 6. Another eminent arbitrator has supported for the usage of the UNIDROIT Principles, which attempt to streamline rules throughout the world, to be applied in the area of international commercial arbitration. According to him, the similar application of UNIDROIT Principles in international commercial arbitration can provide a practical tool for interpreting domestic laws in relation to international commercial and trade law problems²⁵. Perhaps, similar consideration and detailed studies could be made at a later stage by the ASEAN to see if the adoption of *lex mercatoria* or UNIDROIT rules could be agreed by the ASEAN.

The ASEAN Countries may wish to consider implementing a protocol or Convention to regulate the law, practice and procedural rules of Arbitration within the region. In view of increasing trade and contracts entered into between persons

²¹ See Altaro and Guimarey, "Who should determine Arbitrability?", (1996, 12 Arbitration International 115)

²² See Dr Marc Blessing, "The Trouble with Interim relief in International Arbitration - AAA/IBA International Arbitration Day: Global Perspectives" (1997, NY)

²³ See Berger, "The Creeping Codification of the Lex Mercatoria" (1999, Kluwer Law International)

²⁴ See Mustill, "The New Lex Mercatoria: the First Twenty-Five Years" (1988, 4 Arbitration International 86).

²⁵ Klaus Berger, "International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts." (Winter 1998, 46(1) American Journal of Comparative Law).

from the member states, it may be beneficial for the ASEAN to eventually promote and agree upon a set of harmonised rules of evidence such as the (IBA rules on taking evidence) and uniform treatment of the practice of arbitration in the form of a protocol in the region.

These are just some of the issues that could be seriously looked at by the ASEAN member countries to encourage the process of arbitration and attract investors to refer to arbitration seats which are situated within the ASEAN member states who are signatory parties to the 1958 New York Convention.

International Arbitration Centres within ASEAN must be efficient both in terms of attracting arbitrations and quality arbitrators and closer co-operation amongst the centres to strengthen the acceptability of arbitration within the region

It may be beneficial for all ASEAN arbitration centres in the various ASEAN countries to co-operate on a close basis with each other. A co-operative cluster of efficient and strong arbitration centres throughout the ASEAN countries which will strongly appeal to both ASEAN and non-ASEAN commercial parties and investors. Closer co-operation may encouraged shared core interests and developing good “seats” of arbitration in the region may encourage more multinational companies and international law firms to agree to specify arbitration centres within ASEAN as the preferred venue for arbitration in their agreements. Contracting parties who come from 2 different ASEAN countries could perhaps then be more willing to agree in their arbitration agreement to refer their disputes to an arbitration centre based in a neutral 3rd ASEAN country.

As a closing note, perhaps it is equally important that the ASEAN countries may wish to promote arbitration within their own member states not just as a tool of making more money but as a tool to enhance the attractiveness of the forum as a place for international arbitration.

Although, it is important for an international arbitration centre to be economical for disputing parties to refer their disputes, certain institutions seem to have forgotten the need to be able to provide a forum that is attractive for good international arbitrators to work in.

As nicely put by Stephen Bond, the former Secretary General of the International Court of Arbitration,

“Every arbitration aficionado knows the expression: “An arbitration is only as good as the arbitrator” (“Tant vaut l’arbitre, tant vaut l’arbitrage”). However, the party or arbitral institution which wishes to find a “good” arbitrator must nonetheless step back before making any selection in order first to formulate a clear definition of “arbitration” itself and its objectives²⁶.

²⁶ Stephen Bond, “Current Issues in International Commercial Arbitration: The International Arbitrator: From the Perspective of the ICC International Court of Arbitration”, (Spring/Summer, 1991, 12 *Northwestern Journal of International Law & Business* 1).

It is extremely important for the ASEAN International Arbitration Centres to be able to attract top arbitrators to their centres. The danger that is perceived by many distinguished arbitrators is that certain centres have been overzealous in seeking to reduce costs for would be arbitrators by limiting either the standard hourly rates chargeable by arbitrators to levels below what other international centres would allow for. Such reduction of arbitrators fees or even limitation of daily disbursements to a level that do not cater to the hotel accommodation and daily subsistence expenses will not attract leading arbitrators to the centres.

Similarly, it is important that arbitration centres in ASEAN are made more efficient and do not take too long in responding to matters raised by either parties who select their services or by their own appointed arbitrators who may wish to seek clarification of issues that are being referred to them²⁷. It is important that submitted that such issues of cutbacks and misconceived delay due to bureaucracy may drive away many distinguished arbitrators²⁸.

Perhaps, ASEAN centres of arbitration may also wish to consider the possibility of engaging more arbitrators from their own region, as after all, it is most likely that the parties who choose to refer their disputes to such centres are also persons domiciled within ASEAN and may wish for at least one of the 3 panel arbitrators to be from another ASEAN country.

It is equally important for disputing parties to have an impression that they have submitted their dispute to someone who may understand the local customs and local trade and practices in the region as opposed to an eminent arbitrator from a different part of the world who may not be familiar to such practices. There have been in depth analysis and discussions by leading practitioners within Asia as to whether there is an Asian way of style of dispute resolution²⁹.

Allowing more leading ASEAN arbitrators to sit in the international arbitration panels of the ASEAN centres will be a positive way of encouraging arbitration within the region. However, this must be carefully balanced by the need to ensure that arbitration centres do not specifically make it difficult for leading arbitrators who are non-nationals of its country to practice or be admitted into the centres³⁰. There is a need to prevent and stem any misperceptions by non-ASEAN arbitrators, lawyers and multinationals from other regions who are concerned that they will not be able to engage the arbitrators of their choice if they referred arbitration to certain ASEAN countries.

²⁷ Something similar to the concept of the Terms of Reference which is the characteristic instrument in the ICC Arbitration Rules may be a useful tool to consider.

²⁸ It is important to keep an active support and interest from the so called "arbitration mafia" which include leading individuals from many the international law firms and legal practitioners whose support and advice are crucial to the healthy development of arbitration within ASEAN.

²⁹ See Michael Pryles, "Dispute Resolution in Asia", 2nd Edition (2003, Kluwer) and also book review which supports the work by Louise Barrington, Director of the ICC Court of Arbitration, Hong Kong (1999, 10 American Review of International Arbitration 163) which supports the concept of the Asian style of dispute resolution.

³⁰ ASEAN arbitration centres may wish to encourage more ASEAN arbitrators to be registered and involved in their activities. This may appeal to ASEAN business parties who may prefer to have at least one arbitrator from their own country or region to sit in a panel of 3 arbitrators, especially in instances where local customs or local ways of conducting business are involved.

Hopefully, Brunei Darussalam will also be able to set up and develop its own arbitration centre in the near future and that we will be able to learn from the useful experiences that other arbitration centres in ASEAN have gone through. It is also hopeful that there will be a closer degree of co operation and assistance between all the arbitration centres in ASEAN and that we can encourage more international arbitration to our region.