

## ***DIFC-LCIA & LCIA India: between universalism and regionalism***

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### **1. ARBITRAL INSTITUTIONS & THE UNIVERSALIST ASPIRATIONS OF INTERNATIONAL ARBITRATION**

In the last decade or so, all three global arbitral institutions (ICC, AAA-ICDR and LCIA) have set their sights on expanding in jurisdictions far away from their original headquarters (ICDR being arguably the precursor when they opened an office in Dublin in 2001 which has since closed)<sup>1</sup>.

Of course, long before that, each of these institutions had, in different degrees, been servicing the business community on a global basis. It is only recently that these three institutions have started to acquire physical presence on the ground, far away from “home”.

Naturally, the precise reasons for physically expanding abroad vary from one organisation to the other, but for the LCIA the reasons included, *inter alia*, “practicality” and “local knowledge”. Practicality in the sense of being next door to the end users, being staffed with people with the right language skills and cultural references, and being in the right time zone. In sum, being available to assist locally. By local knowledge I mean knowledge of the local industries and of their needs, of the local arbitrators, and also of the peculiarities of the local legal systems. Obviously, another factor was “appeal”. A local centre that one may physically visit, is more appealing to some users than one located many miles away, even in today’s electronic communications age.

The routes taken by each of three global institutions in their recent expansions are not the same. The ICC opening a “branch” of its Secretariat in Hong Kong is not quite the same as the LCIA or the ICDR participating in the creation of new and separate arbitration centres in places like Dubai or India for the LCIA, or Bahrain for the ICDR. But whatever route was taken, all three institutions can arguably be said to participate to some extent in this regionalisation of arbitration.

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<sup>1</sup> The LCIA’s first foreign venture was the DIFC-LCIA Arbitration Centre, which opened in Dubai in 2008. The ICC International Court of Arbitration opened a branch of its Secretariat in 2008 in Hong Kong. Of course, before that the ICC had been represented by many regional representatives in various jurisdictions. In 2009, ICDR opened an arbitration centre in Bahrain, BCDR.

Now, “regionalisation” and “international arbitration” are two concepts that may seem, at first, difficult to reconcile. This may be because international arbitration, by definition, is a dispute resolution mechanism designed for, and concerned with, cross-border disputes. International arbitration, we are told, places itself at the border of different legal traditions (the common law and civil law traditions mostly) incorporating aspects of both, because the users of arbitration -the merchants and their counsel- bring with them into the proceedings aspects of their own legal cultures. In a word, arbitration has a universalist character or, at least, it carries universalist aspirations.

For Ahmed El Kosheri, these universalist aspirations mean “*transcend[ing] the particularities of any given culture and, going beyond regional and domestic experience, seek[ing] common values and juridical and ethical canons that command universal acceptance*”<sup>2</sup>.

In this context, therefore, it is not surprising that the venturing outside their own jurisdictions by institutions like the LCIA raises some eyebrows. The argument or question I have heard several times when I was the Acting Registrar of DIFC-LCIA, can be summed up as follows: If international arbitration is a truly universal process, shouldn’t institutions aim to provide their services globally, rather than seeking to adapt these services to local requirements or preferences? In other words, shouldn’t institutions seek to offer the same “universal” product (that is, their arbitration rules and case administration) no matter where the parties are based, where the performance of the contract takes place, or where the seat of the arbitration is?

It may well be the case that the answer to this question will depend on where one stands on the theory of arbitration. I can see that “transnationalists”<sup>3</sup> for example might, rightly or wrongly, not embrace regionalism with as much enthusiasm as lawyers who relegate arbitration to a component of a single national legal order (to paraphrase Professor Gaillard)<sup>4</sup>.

Arguably, the question of whether institutions should provide their services globally, rather than adapting them to local requirements or preferences, is best answered by a cautious “*Yes, but*”. *Yes*, institutions like the LCIA may have a universal vocation, *but* it is not clear that they can ignore regionalism altogether for at least two reasons<sup>5</sup>.

First, there seems to be a growing consensus that globalisation is, in fact, accompanied by a degree of regionalisation. Institutional arrangements and economic activities, it has been argued, shift from the national scale both upwards to a global scale, and downwards to the scale of regional configurations, thus becoming simultaneously more localised and more global at the same time. This has been described by some political scientists as ‘glocalisation’<sup>6</sup>.

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<sup>2</sup> Ahmed S. El Kosheri, “*Universalism in Today’s Arbitration Culture*”, in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION, LIBER AMICORUM ROBERT BRINER, G. Aksen, K-H Bocktiegel, Lord Mustill, P M Patocchi, A-M Whitesell (Eds), ICC Publishing, 2005, at p. 249.

<sup>3</sup> Meaning proponents of the representation of international arbitration as a transnational legal order, autonomous from the domestic legal systems and from the international legal order. See for example Julian Lew, “*Achieving the Dream: Autonomous Arbitration*,” Arbitration International, Volume 22, Issue 2, 2006, p. 179.

<sup>4</sup> Emmanuel Gaillard, LEGAL THEORY OF INTERNATIONAL ARBITRATION, Martinus Nijhoff Publishers, 2010, p. 15.

<sup>5</sup> This presentation does not enquire into the question of the mandatory rules at the place of arbitration, which may require some tailoring of the arbitral process.

<sup>6</sup> Erik Swyngedouw, “*Globalisation or ‘Glocalisation’? Networks, Territories and Rescaling*”, Cambridge Review of International Affairs, Volume 17, Issue 1, 2004.

Second, the universal character of arbitration does not require the exclusion of regional cultural differences or preferences. In fact, if it is to remain globally relevant in this “glocalised world”, international arbitration might need to accommodate these regional preferences. To paraphrase Ahmed El Kosheri again, international arbitration needs to be able to “*widen the intercultural base on which it stands*” and to “*search globally for the wisdom of the whole humanity*” rather than to confine this search within the limits of one or two cultural traditions, like the common law and the civil law, however rich<sup>7</sup>.

It is not immediately clear what the conceptual impossibility is with fulfilling a universal aspiration while, at the same time, accommodating some regional preferences or differences in arbitration. After all, if one is willing to accept that the procedure may vary greatly from one arbitration to another depending on the industry sector concerned (for example a shipping arbitration on the one hand, and a construction arbitration on the other), then why can’t the same be possible (or even desirable?) depending on the origins of the parties, their lawyers or of the tribunal, even where these are foreign to the common law and civil law worlds<sup>8</sup>.

The conclusion of this first part is that, arbitration, and therefore arbitral institutions, might have to conjugate “universalism” with a degree of “regionalism”. And this is precisely what the challenge has been, and still is, with the LCIA’s projects in India and Dubai.

## **2. DIFC-LCIA & LCIA INDIA: NAVIGATING BETWEEN UNIVERSALISM AND REGIONALISM**

In practice, the combination of “universalism” and “regionalism” can be seen at different levels in both DIFC-LCIA and LCIA India. The structure, the services offered, and the arbitration rules of the two institutions show this attempt to combine, with varying

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<sup>7</sup> A. El Kosheri, *op. cit.*, at p. 249.

<sup>8</sup> In an article on globalisation and the future of arbitration, Professor Hanotiau stresses, *inter alia*, that whilst the development of international arbitration as an autonomous or denationalised system, has implied a certain degree of convergence of practices, this process is in fact accompanied by a greater emphasis on party autonomy and flexibility. In our view, it is this greater emphasis on party autonomy which allows arbitration to cater for regional preferences as appropriate. See Bernard Hanotiau, “*International Arbitration in a Global Economy: The Challenges of the Future*”, *Journal of International Arbitration*, Volume 28, Issue 2, 2011, pp. 89 – 103.

The difficulty, of course, consists of giving, in each case, the correct weight to the emerging global best practice (some may say, “transnational norms”) and to the regional peculiarities respectively. It may be argued that this difficult balancing act is the *raison d’être* of arbitration as an alternative to domestic court litigation. See for example Lew, Mistelis & Kroll: “*As parties are drawn from jurisdictions across the world, with very different legal, political, cultural and ethical systems, arbitration provides a forum in which all of these interests can be protected and respected, whilst determining the most appropriate way to resolve the dispute between the parties.*”. Julian Lew, Loukas Mistelis, *et al.*, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION*, Kluwer Law International, 2003, p. 6. See also in this sense the article of Paolo Esposito and Jacopo Martire: “*Although it has been stressed that ‘in international arbitration, where the activities giving rise to disputes are transnational or global in nature and where the participants come from different national and legal backgrounds or cultures, divergences are not desirable’, it is a fact that international arbitration is all about differences which are endemic to the system it operates within*”. Paolo Esposito and Jacopo Martire, “*Arbitrating in a World of Communicative Reason*”, *Arbitration International*, Volume 28, Issue 2, 2012, p. 330.

In sum, support for the representation of international arbitration as an autonomous or denationalized system does not necessarily require seeking to erase all procedural idiosyncrasies, whether geographically or industry sector based.

degrees of success, the local/regional features with the main characteristics of what has done the success of the LCIA globally.

In some instances, the balance tips towards the “regional”, while in some other it inclines in the direction of the “global”. Arguably, DIFC-LCIA often finds itself more to the “global” side than LCIA India<sup>9</sup>.

### ***2.1. The Structure***

The LCIA took the decision of opening up two separate arbitration centres, not two branches of the main institution. DIFC-LCIA was set up as a separate arbitration centre in 2008, through a joint venture between the LCIA and the Dubai International Financial Centre. LCIA India is also a separate arbitration institution from the LCIA, though it was established as a subsidiary of the LCIA in India. Both DIFC-LCIA and LCIA India, as corporate (not-for-profit) entities have their own Boards of Directors, distinct from the LCIA Board. Arguably, opening up mere branches would have appeared less at odds with the universalist vocation of the LCIA, but it would arguably not have permitted to tailor the services offered to the local needs as much as the opening of two local centres.

While, structurally, DIFC-LCIA was set up under a joint venture between the LCIA and the Dubai International Financial Centre<sup>10</sup>, whereas LCIA India is a subsidiary of the LCIA, there are very few differences as to how these two centres interact with, or relate to, the LCIA in practice. Each centre has its own staff, and is now headed by its own Registrar<sup>11</sup> but in each case the staff was selected and trained by the LCIA in London, on LCIA case management procedures, and they remain, at least for the time being, constantly in contact with London for training purposes<sup>12</sup>. In addition, both the Secretariats at LCIA India and DIFC-LCIA work under the authority of the same “LCIA Court”, under which the LCIA’s own London Secretariat is also placed. Of course, the objective is to combine regional features with the main characteristics of what has made the LCIA successful globally.

Geographically, the situation of the two centres is quite different. LCIA India is based in the legal capital of India, Delhi, at the heart of the traditional Indian legal world. DIFC-LCIA, on the other hand, is located within the boundaries of the Dubai International Financial Centre. The DIFC is, by definition, a global situs. It was created specifically for the purposes of attracting foreign businesses, and its structure (a free zone with its own laws and courts) reflects this approach.

### ***2.2. The Services offered***

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<sup>9</sup> There are good reasons for that. Attitude of local legal community towards arbitration and the LCIA. In turn this depends on the local legal profession which is more internationalised in the UAE than it is in India. In other words the local pressures to resist the “global” is felt more acutely in India than in Dubai.

<sup>10</sup> The DIFC is a Free Zone located in the emirate of Dubai, which was created in 2004 by a decree of the Ruler of Dubai (in accordance with UAE Federal Law) and which has its own laws for commercial and civil matters - based on English law- and its own judicial system, the DIFC Courts. The Courts themselves are staffed in part by Emirati judges and in part by foreign judges, including retired English justices.

<sup>11</sup> Since March of this year, the DIFC-LCIA Secretariat is headed by Mr Nizar Fadhlaoui, a US-qualified lawyer who speaks Arabic, French and English, and who will aim to promote the centre further in the coming years. LCIA India has been headed by Mr Ajay Thomas from the inception, an Indian barrister who had been the head of the India Desk at SIAC previously. He is assisted by a new Deputy Registrar, since earlier this month: Abhishek Srivastava.

<sup>12</sup> In practice, the staff of the LCIA in London is in communication with both Dubai and India on a quasi-daily basis, in particular to ensure a degree of harmony in respect of the approach of the three institutions to case administration.

The services offered also demonstrate features of both universalism and regionalism. To start with, there is no restriction in the arbitration rules of DIFC-LCIA and LCIA India preventing them from offering their services outside of their respective bases (*i.e.* India and the UAE). The situations, however, of LCIA India and DIFC-LCIA are quite different.

India is a large country and there is, perhaps, more of an expectation that the cases LCIA India will administer will mostly come from, or be related to, India, even in the long term. DIFC-LCIA, on the other hand, from the beginning has administered cases involving parties from outside the UAE, and in fact from outside the Middle East<sup>13</sup>. This being said, and as indicated previously, it is expected that DIFC-LCIA's added value (and the same can be said of India) will be its expertise with respect to local disputes involving local/regional parties, and industries. For these purposes, DIFC-LCIA is continuing to develop its knowledge of local industries and of their needs, of the local arbitrators, and also of the peculiarities of the local legal systems.

### **2.3. The Rules**

The arbitration rules of both institutions also show this attempt to strike a balance between adapting to the local realities and maintaining what made the strength of the LCIA as a global institution.

One of the selling points of LCIA India and DIFC-LCIA is that they offer “*tried and tested*” arbitration services, meaning arbitration in accordance with rules and case management procedures that are based on the LCIA's in London. Therefore whilst DIFC-LCIA and LCIA India have their own dedicated sets of arbitration and mediation rules, these follow very closely those of the LCIA. The LCIA rules having developed over a long period of time to incorporate, sometimes even anticipate, best practice.

But here again there is a difference between India and Dubai. Whilst the Dubai Rules are almost identical to the LCIA Rules of 1998, the Indian Rules show some notable differences. The view is that they had to be adapted to meet the requirements of the Indian Arbitration Act and the local realities. One notable change is that the Indian rules do not provide for a default seat where the parties have not agreed a seat in writing. Another notable difference is that the third and presiding arbitrator must, under the LCIA India Rules, always be selected by the LCIA Court. Other differences include the provisions on choice of law<sup>14</sup>, and on challenges to arbitrators<sup>15</sup>.

As already mentioned, the LCIA Court is the ultimate guardian of the arbitration rules of the three institutions. This means, for instance, that arbitrators, whether or not nominated by the parties in Dubai and India, are “appointed” by the LCIA Court under both sets of

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<sup>13</sup> Parties involved in DIFC-LCIA's cases to date have been from the UAE (including Dubai, Jebel Ali Free Zone, Fujairah, Abu Dhabi, Sharjah) but also from further afield like Kuwait, Saudi Arabia, Qatar, Oman, Malaysia, Hong Kong, Netherlands, Germany, Norway, the Cayman Islands and the British Virgin Islands. As a result, the parties' legal representatives have included, not only law firms based in the Middle East region (meaning local firms or local offices of foreign law firms), and but also firms from Western Europe and Asia. Likewise, the disputes at DIFC-LCIA concern both local and foreign industries with such subject matters as commodities, construction, engineering, energy and consultancy services, with disputes ranging in their value between the small local c.US\$50,000 case to a more impressive US\$140 million matter.

<sup>14</sup> The provisions on choice of law contained in the LCIA India rules seem to aim to reflect the requirement of the Indian Arbitration Act (1996) that the arbitrators take into account all the circumstances surrounding the dispute, when they select the law applicable to the merits (in the absence of an agreement by the parties).

<sup>15</sup> In accordance with Indian law, the grounds for challenges are not limited to lack of impartiality or independence, but also include the lack of a qualification that has been agreed by the parties.

rules. The intention, of course, is that there will be some uniformity in the quality of the services provided by all three institutions.

### **3. WHAT'S NEXT FOR LCIA INDIA AND DIFC-LCIA?**

The next few years will present similar challenges for LCIA India and DIFC-LCIA. These include moving beyond the unavoidable teething problems that any new venture encounters, and becoming regionally accepted as leading dispute resolution centres; in other words, becoming part of the local legal landscape.

This is no easy feat by any stretch of the imagination, but there have been some very encouraging signs. The past two years, for instance, saw important milestones at DIFC-LCIA when the Dubai Courts granted recognition and enforcement of the first two DIFC-LCIA awards. In the first case, the seat of the arbitration was London (rather than the DIFC or an Emirate of the UAE), and, as such, the application was made under the New York Convention. This case is of particular importance as it was the first foreign award ever to be enforced under the New York Convention in the Emirate of Dubai following its ratification of the Convention in 2006. In the second case, the seat was the DIFC, and enforcement therefore had to be granted after consideration by a joint committee composed of members of the Dubai and the DIFC Courts, constituted in accordance with the 2009 enforcement "Protocol" between the Dubai and DIFC judiciary. In both cases, the Respondents were companies incorporated in the UAE (but outside of the DIFC).

To conclude, it is hoped that these two centres will prosper as their contribution goes beyond adding to the dispute resolution mechanisms available to local businesses. Arguably, these two institutions, just like other institutions, whether regional (like DIAC, CRCICA or BCDR) or global (like the ICC), participate, through conferences and training seminars, in promoting international arbitration in their respective regions.

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