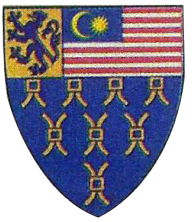
UNIVERSITY CUM COURT ANNEXED ARBITRATION



The Honorable Society of Lincoln's Inn
Alumni Association, Malaysia

Proposal and Model Scheme Book for Malaysia 2018

CONCEPT OF
JUSTICE DATUK DR. HJ. HAMID SULTAN BIN ABU BACKER

PROMOTER FOR GLOBAL IMPLEMENTATION:
LINCOLN'S INN ALUMNI, MALAYSIAN BRANCH

Foreword by
Tun Zaki Azmi
Former Chief Justice, Malaysia

Review of the Concept Paper by
Dato' Mah Weng Kwai
Judge, Court of Appeal, Malaysia (Rtd.)

Review of the Rules by
Dato' Mary Lim Thiam Suan
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Message by
Prof. Dato' Dr. Hj. Mohd Naim bin Hj. Mokhtar
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Review by
Prof. Dr. Engseng Ho,
Director, Middle East Institute,
National University of Singapore

Review by
Datuk Seri Gopal Sri Ram
Judge of Federal Court (Rtd.)

Review by
Thayananthan Baskaran
Chairman, Chartered Institute of Arbitrators, Malaysia Branch

MODEL RULES FOR MALAYSIA WRITTEN BY:

- Justice Datuk Dr. Haji Hamid Sultan Abu Backer
- Dato' Sri Dr. Ashgar Ali, Dean of Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia
- Arun Kasi, Advocate & Solicitor, Arbitrator

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Table of Contents

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Summary

University Arbitration is a researched concept that benefits not only the state, the judiciary and universities but also the public at large.

Inter alia it proposes:

- To empower university faculty members and their graduates to be trained in Alternative Dispute Resolution mechanism.
- To utilize them via a court process to offer dispute settlement via arbitration for cases which has been filed in court.
- The choice of arbitration is voluntary but the courts are required to facilitate the process, similar to the mediation process available through the courts.
- The scheme can be implemented without legislative amendments or major amendments as opting to arbitration under the scheme is only a voluntary process. The scheme also allows parties to select one of the judicial officers of their choice to arbitrate their dispute subject to the consent and approval of the Chief Justice, which may be similar to the practice in England.
- The court venue is proposed to be the place of arbitration.
- That the arbitrator's fee where a judicial officer has been selected to be the arbitrator is to paid to the court as revenue to the State.
- The process of challenge through courts the decision of the arbitrator is limited. This in turn will reduce appeals to the Federal Court, Court of Appeal as well as the High Court.

The scheme thus far has the support of eight public universities offering law in Malaysia, as well as the Lincoln's Inn Alumni (President - former Chief Justice of Malaysia Tun Zaki Azmi); Inns of Court Malaysia, Chartered Institute of Arbitrators (CIArb, London) – Malaysian Branch and other institutions.

It is beyond doubt that if the scheme is successfully implemented, it will reduce the cost of the government financing civil and commercial disputes resolution by at least fifty percent within 5 years. It will also create a non-litigious society. It will also stand as a near substitute to legal aid schemes to help the poor, needy and oppressed to have access to justice in a stress-free mode in contrast to litigation.

Public support for the scheme will be a reality if it is supported through a court process. By giving a choice for the parties to the litigation to opt for arbitration by selecting University arbitrators or judicial officers of their choice, will in my view, inspire greater confidence in the judiciary at all levels.

DATUK DR. HJ. HAMID SULTAN BIN ABU BACKER
Judge, Court of Appeal Malaysia.
Adjunct Professor of International Islamic University Malaysia (IIUM) and Multimedia University (MMU); Panel Advisor of Islamic Science University of Malaysia (USIM); Barrister and a Fellow of the Chartered Institute of Arbitrators (London); Honorary Fellow, Middle East Institute (MEI), National University of Singapore; Honorary Visiting Professor of Damodaran Sanjivayya National Law University (DSNLU), Visakhapatnam, India.

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Introduction

[1] This University Arbitration Model Scheme Book with the proposed Model Rules for University cum Court Annexed Arbitration for Malaysia is published with a view to bring to the attention of the stakeholders in Malaysia as well as globally the concept of empowering University faculty members and others associated or linked to the Universities such as Alumni of the University to be trained as arbitrators, mediators, conciliator, etc. and for them to assist to clear cases before courts justly, economically and expeditiously, subject to the agreement of the parties to the litigation and consent of the judge.

[2] The concept was mooted by Justice Datuk Dr. Haji Hamid Sultan bin Abu Backer (Justice Hamid) who thereafter had taken the initiative to do a survey in all Malaysian universities offering law, namely: UIA, UM, MMU, UiTM, UniSZA, UUM, UISM and UKM. The outcome of the survey is that all the faculty members want the concept of University Arbitration to be implemented in Malaysia. Some were even prepared to act as arbitrators *pro bono* to acquire practical knowledge of the subject they are teaching.

[3] This scheme can also facilitate parties to the litigation opting to arbitrate their disputes by choosing a judicial officer from within the judiciary as the arbitrator with the consent of the Chief Justice, a process similar to the current court annexed mediation scheme.

[4] Justice Hamid, at the invitation of the Middle East Institute of National University of Singapore, also did a survey in Singapore. During the survey, leading arbitration practitioners and some faculty members were given the concept paper, research paper as well as the survey questionnaire. The survey result was positive in support of the concept.

[5] The concept paper was also given to Inns of Court Malaysia (ICM). The ICM executive committee appointed Justice Hamid to chair the University Arbitration Sub-Committee to study the viability of the implementing the concept.

[6] To facilitate the concept, Justice Hamid, Dato' Sri Dr. Ashgar Ali and Mr. Arun Kasi had formulated the Model Rules for University cum Court Annexed Arbitration. The Model Rules closely follow the UNCITRAL Model Rules 2010 and make it also relevant.

[7] The first draft of the Model Rules was brought to the attention of the University Arbitration Sub-Committee (under ICM) and was unanimously approved with the proviso for the Model Rules to be further amended where necessary to facilitate the views of the stakeholders. The Sub-Committee consisted of the Deans and faculty

members of law universities or their representatives as well as a representative of the Chartered Institute of Arbitrators Malaysian branch (CIArb).

[8] The Model Rules which forms a part of this booklet is always subject to amendment according to the needs of a country.

[9] The Model Rules are based on the assumption that

(a) the Chief Justice approves the University cum Court Annexed Arbitration scheme;

(b) the participating Universities agree to their obligations under the Rules;

(c) CIArb agrees to supervise the scheme;

(d) Lincoln's Inn Alumni, ICM and CIArb accept their obligation to train the Universities faculty members and their associates and duly certify them as 'university arbitrators'.

[10] University cum Court Annexed Arbitration scheme has no relevance to Institutional Arbitration or *Ad-Hoc* Arbitration. In the first instance, it is aimed at dealing with Civil and Commercial matters before the Subordinate Courts, although conceptually there is no limitation to applying the rules to any matter irrespective of the court that the matter is currently before. It will be entirely at the discretion of the Chief Justice to provide, extend and limit its scope of operation from time to time as the Courts are the facility providers under the scheme.

[11] The University cum Court Annexed Arbitration is a voluntary process. The scheme can become operative in the following manner:

(a) Once the defendant has filed his appearance, the court can propose to the parties that if they agree it can be dealt with under University cum Court Annexed Arbitration scheme.

(b) Alternatively, if the plaintiff is not able to get a default judgment or summary judgment or the defendant is not able to strike out the claim or the mediation was not successful, the court can again propose for the matter to be settled by University cum Court Annexed Arbitration.

(c) At any stage of the proceedings, the parties can agree for the matter to be referred to University cum Court Annexed Arbitration, with consent of court.

[12] The benefit of University cum Court Annexed Arbitration is that the scheme has been drafted to ensure that the remuneration of the arbitrator will only be a nominal sum. In addition, party to party costs cannot exceed half of the scale costs under the Rules of Court 2012.

[13] The benefits to faculty members or others associated with the university will be that they will get a good exposure to the subjects which they are

involved in as well as they can earn a small fee for sitting as arbitrators.

[14] The benefits to the University as well as the supervising institution is that they will earn a fee for administrative support.

[15] The benefits to the lawyers is that they can still continue to represent their clients. In addition, lawyers from the participating Universities can also be appointed as university arbitrators. That is to say, even though University faculty members may not be available in certain states, districts or courts, the alumni members of the University can be appointed as arbitrators. In essence, there will not be a shortage of arbitrators throughout Malaysia to participate in the scheme.

[16] The scheme thus far has the support of 8 public universities offering law in Malaysia, as well as the Lincoln's Inn Alumni (President - former Chief Justice of Malaysia Tun Zaki Azmi); Inns of Court Malaysia, Chartered Institute of Arbitrators (CIArb London) – Malaysian Branch and other institutions.

[16] The University cum Court Annexed Arbitration Scheme can be implemented without any amendment to the Arbitration Act 2005 or Rules of Court 2012. A practice direction will be sufficient. By an analogy, the power for the court to propose mediation is already in place under Order 34 of Rules of Court 2012 which deals with case management matters.

[17] It must be emphasised here that CIArb's role in the Scheme is to facilitate a successful pilot project, at the first instance. Subsequently, it will be the decision of stakeholders to consider whether the Scheme can be facilitated through any Arbitral Institutions of Malaysia, solely or jointly with CIArb or any other relevant body.

[18] Justice Hamid will take personal effort to bring this concept to the Chief Justices of counties like Singapore, India, Pakistan, Bangladesh, China, Hong Kong, Australia, New Zealand, England, France, Germany, UAE, Saudi Arabia, America and Canada. Justice Hamid will also extend his personal efforts to get a message and/or review of the concept from major arbitral institutions and bodies around the world, with a view to bringing global awareness of the concept. This will also facilitate them to circulate this Scheme Book to the judicial members and to other stakeholders with a view to implement the concept in their countries. The full version of this booklet will be published once all such messages and/or reviews have been collected.

Dato' Seri Dr. Ashgar Ali
Dean International Islamic University Malaysia

Arun Kasi

Advocate Solicitor, Malaysia;

Fellow of Chartered Institute of Arbitrators, London

Foreword By

TUN ZAKI AZMI
Former Chief Justice, Malaysia

I, as President of the Lincoln's Inn Alumni Association of Malaysia, am impressed with the novel concept of my fellow alumni member Justice Datuk Dr. Haji Hamid Sultan bin Abu Backer. The concept, if implemented globally, will enhance access to justice and provide an alternative efficient and cost effective dispute resolution mechanism for matters which have been filed in court.

The University Arbitration Scheme as advocated in this handbook will be of great advantage to the litigants and all stakeholders involved in the administration of justice. The scheme when implemented through the participation of the universities is likely to provide opportunities for students to understand the effectiveness and efficiency of alternative dispute resolution mechanisms. In the long run, this will pave for a less litigious society which ultimately will save money for tax payers in running a massive court system.

The concept aims to assist the average man on the street and to minimize the costs in ligation process. Very importantly, it aims to reduce the backlog of cases in court. Though Malaysia can be proud to say there is no backlog of cases, nevertheless the concept, if implemented in Malaysia as well as other jurisdictions, will be of great benefit to the public. For that reason alone, Lincoln's Inn Alumni is pleased to promote this concept for it to be implemented globally.

Tun Zaki Azmi
Judge, Dubai International Financial Centre Courts
Chief Justice of Malaysia (Rtd)
Honorary Bencher of Lincoln's Inn (London)

Review by

DATO' MAH WENG KWAI
Judge Court of Appeal, Malaysia (Rtd.)

This novel legal concept in arbitration as conceived by Datuk Dr. Haji Hamid Sultan Bin Abu Baker, a senior judge of the Court of Appeal of Malaysia, is in my view, a brilliant and attractive concept. It proposes to tap the talents of law lecturers and professors of universities in dispute resolution by arbitration and other forms of alternative dispute resolution (ADR). The concept, if and when implemented in any country, will *inter alia* relieve courts of part of their workload and reduce the cost of arbitration, which are global challenges in any administration of justice. It will also benefit the universities and the academia by a process of exposure of law lecturers and professors to arbitration and ADR. The concept is of global importance in dispute resolution and paves the way for a new dimension in arbitration and ADR.

The paper has been published in a number of reputable journals including the Journal of the Commonwealth Lawyers' Association, Madras Law Journal, APRAG Newsletter, Current Law Journal, etc. I have also read a number of positive reviews by notable jurists on the concept paper. In my view, the concept paper is a contribution to humanity itself as it will serve as a form of legal aid to the poor and needy as well as the oppressed to seek justice.

It will be a pleasure and honour for Lincoln's Inn Alumni Malaysia to promote this robust concept globally.

Dato' Mah Weng Kwai
Deputy President of Lincoln's Inn Alumni Association of Malaysia

Review by

DATO' MARY LIM THIAM SUAN
Judge, Court of Appeal, Malaysia

I had the opportunity of reading the University Arbitration concept paper and the proposed model Rules to facilitate the concept conceived by Justice Datuk Dr. Haji Hamid Sultan bin Abu Backer. The Rules have been carefully considered and made relevant to facilitate University Arbitration.

The special features of the Rules such as :

(i) low or no party-to-party cost;

(ii) limited arbitrator's remuneration;

(iii) time-line for completion of the proceedings;

(iv) mode of communication by email; and

(v) publishing the award on websites,

to name a few, are interesting and novel in contrast to rules of conventional arbitral institutions. Very interestingly, the fees and costs regime for arbitration is relatively low. This is likely to assist the average citizen in any country who is entangled in litigation process.
The Rules are dynamic, paving for adversarial as well as inquisitorial approaches in arbitration. In essence, the model Rules are simple and easy to follow. The faculty members of the universities should not have much difficulty applying the Rules justly.

Dato' Mary Lim Thiam Suan
Secretary, Lincoln's Inn Alumni Association of Malaysia

Message by

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I had the privilege to read Justice Hamid Sultan's Scheme Book on 'University cum Court Annexed Arbitration' in draft. Justice Hamid is to be commended for his visionary and prolific ability to set into motion an avenue for a class of intellectuals at universities to delve into dispute resolution.

Thus far, arbitration in Malaysia has been centred primarily on legal practitioners and at least to those having special skills in specific industries, such as construction and perhaps intellectual property. What Justice Hamid has proposed through his scheme book is to extend the sphere of arbitration through universities, where lecturers and professors, be it current, retired or even visiting are able to sit as arbitrators, mediators, conciliators, adjudicators, etc. inclusive of their graduates. These will bring to the footsteps of the universities, 'real live' issues for determination.

The scheme book further illuminates a novel concept to allow judges as well as magistrates to sit as arbitrators. In this manner, parties whilst in court can opt to refer their dispute to arbitration to a judicial officer of their choice within a fee scheme still being generated through the court albeit on a reduced rate. This proposal of a lower cost of operation of such scheme of arbitration is certainly music to the ears to the ordinary man on the street. Justice Hamid's approach of an arbitration process through a court scheme will assist the courts to dispose of cases, expeditiously, economically and justly. Such a concept of arbitration is well recognized in England. The Syariah legal system will equally benefit from such a concept.

Whist all these are in its inception as concepts but it is a starting point for discussion with a view of developing it into reality. Justice Hamid is a distinguished scholar of international repute and also a well renowned jurist in civil and Syariah law. Coupled with his literary works, articles and judgments, as well as papers presented at international forums, he has engaged the past with the present for the future. His illustrious career includes being an adjunct professor in three Malaysian universities and two foreign universities. His concepts are worth evaluating that will yield greater benefit for society.

I congratulate him for coming out with this outstanding concept. I hope and pray to the Almighty that the government and the judiciary with the assistance of the universities will take cognizance of his proposals and implement the scheme expeditiously.

Thank you.

YA. Dato' Dr. Hj. Mohd Naim bin Hj. Mokhtar
Judge, Syariah Court of Appeal
Malaysia.

Review by

PROF. DR. ENGSENG HO
Director, Middle East Institute, National University of Singapore

University Arbitration: An Idea Whose Time Has Come.

I am delighted that Justice Dr. Hamid Sultan has brought his concept of University Arbitration close to adoption, with the publication of this *University cum Court Annexed Arbitration Model Scheme Book*, in collaboration with Dr. Ashgar Ali and Mr. Arun Kasi. The concept of University Arbitration reflects Justice Hamid's unusual personal qualities, combining abundant practical wisdom with an erstwhile freshness of ideas. University Arbitration is a concept whose time has come because it has the potential to make available to a wide public some of the benefits of arbitration –a relatively unencumbered adjudication process, party autonomy, confidentiality— while mitigating some of its drawbacks: high cost and long duration. If successfully implemented, such a new forum for dispute resolution can expand the circle of justice, serving more people, and poorer ones as well, by making it "faster, cheaper, better".

What I find particularly innovative about University Arbitration is its potential to overturn the common assumption that higher cost equals higher quality. Arbitration conducted at the university can be not only "cheaper", but "better" as well, compared to commercial arbitration and court litigation, in the dimension of subject-matter expertise. Justice Hamid identified this counter-intuitive potential by observing that universities host experts in numerous fields who are remunerated at lower levels than industry practitioners. If industry practitioners can act as arbitrators and mediators, why not the professors who taught them in the universities? University Arbitration is precisely such a scheme, to mobilize university-based experts in all manner of fields in the cause of justice. As Justice Hamid points out, common-law systems prioritize procedural justice at the expense of substantive justice. In personnel terms, legal professionals play a larger role in dispensing justice than subject experts. University Arbitration proposes to shift the weight of adjudication onto the other foot, as it were, giving subject experts a larger role to play than legal professionals.

He has since worked out a number of the key steps needed to make that shifting of judicial weights a practical reality, as laid out in this handbook.

These include court referral, the adaptation of internationally accepted UNCITRAL Model Law and Model Rules, and the collaboration of arbitral

institutions in helping universities and their experts get up to speed in their ability to conduct arbitration.

Both history and contemporary developments suggest that university arbitration has wide scope for adoption. Disputants in maritime conflicts often seek recourse to mediators and arbitrators from within their own industry, due to the specific conditions and traditions of the business. In historical practice, Muslim judges regularly brought in experts in a matter at hand to play a major role in settling a dispute, with the goal of returning disputants back into the regular business of mutually beneficial exchanges. While Islamic Finance has become partially integrated with global financial markets, with the help of panels of Islamic jurists advising on products, the number of test case disputes has so far been small. University-based Islamic jurists, especially those with financial expertise, will have roles to play as such cases multiply in the future, especially in those with smaller quanta involved. In hi-tech, the torrid pace of technological change in disruptive digital industries makes it increasingly difficult for the technically informed jurist to arrive at just determinations with confidence. The universities which power the basic research underwriting such change would be suitable places for finding experts able to understand and adjudicate the consequences of such technological disruptions.

The Middle East Institute at the National University of Singapore is honoured and proud to count Justice Hamid Sultan as one of its distinguished Honorary Fellows. His participation in MEI's Transsystemic Law Cluster Seminar has been a boon to our research and thinking. We are pleased to have contributed to the development of the idea of University Arbitration by facilitating the survey Justice Hamid conducted in Singapore, and by publishing his concept paper co-authored with Mr. Arun Kasi, "Empowering Universities as Arbitration Centres: A Global Perspective," MEI Perspectives Series No. 10, April 2018. This paper has been received with great interest in judicial circles in the Arabian Gulf states.

We look forward to the further development of this highly innovative and beneficial idea of University Arbitration, and to the reality of its adoption in Malaysia and elsewhere. It is an idea whose time has come.

Engseng Ho
Director, Middle East Institute,
Muhammad Alagil Distinguished Visiting Professor
in Arabia Asia Studies, Asia Research Institute,
National University of Singapore;
Professor of Anthropology and History
Duke University.

Review by

DATUK SERI GOPAL SRI RAM
Judge, Federal Court, Malaysia (Rtd.)

University Arbitration – A Review

This paper has proposed a move away from traditional sources of arbitrators and mediators to a hitherto untapped source of dispute resolvers. The paper writers – a senior judge of the Court of Appeal with a wealth of experience and a legal practitioner – suggest that disputants and the court look to certain well established multi-discipline universities for dispute resolvers.

The idea, though novel has much merit. First, it points to the availability of specialists in given subjects which may be involved in the dispute. Take the example of an arbitration involving civil and electrical components. A university which has specialized engineering faculties provide a rich source of expertise to readily understand what the parties are talking about. Lawyers require experts to help them understand what the dispute is about. But here we have those very experts deciding the dispute.

Second, the suggestion has the merit of being cost effective. Arbitrations can be and usually are expensive. Lecturers and professors may come at a lower cost. This is always an attraction to men of commerce.

Third, the paper meets the anticipated objection on training in dispute resolution. Lawyers, by their training, usually have a keen eye on what forms the core of the dispute. And they have for that reason an inbuilt dispute resolution gene in their system. But decision making is an art that can perhaps be readily acquired through training. There are, of course, many such training courses available in the international arbitration scene. The other side of the coin is this. It may be an attraction for teachers of other disciplines to take the course if they are told that they may earn more than the meagre salaries they draw.

Fourth, the paper writers have suggested a legislative platform to launch a university arbitration. This makes chosen universities centres of arbitration. Indeed, there may be a course on dispute resolution introduced at the degree or

diploma level into which may be enrolled teachers of engineering, architecture and the like to enroll and learn the art of decision making and the writing of awards. This last skill is a must. As matters stand it is a sad truth that some of our judicial arbiters fail miserably to produce reasoned judgments that stand equal to those of other common law jurisdictions.

Apart from putting forth a cogent argument for the suggested change, the writers have taken the trouble of tracing the history of modern international arbitration. This is most useful for novices.

The arguments of the paper writers are so convincing that one may not be surprised to hear in the not too distant future of a University Arbitration Centre which provides speedy, accurate and fair decision making in the field of private dispute resolution. Lawyers and trained arbitrators -look out!

Gopal Sri Ram

Review by

MR. THAYANANTHAN BASKARAN,
Chairman, The Chartered Institute of Arbitrators, London
(Malaysia branch)

I have had the pleasure of reading these Model Rules, as they were being developed over the past few months and am delighted to see them in their present form.

At the time when your Lordship first mooted the University Arbitration model, I was intrigued by its novelty. The University Arbitration model builds on the concept of expedited arbitration. Expedited arbitration has become popular in recent years, with most established arbitration institutions publishing rules for such arbitrations. This includes the expedited procedure or fast track rules published by the International Chamber of Commerce, the Hong Kong International Arbitration Centre, and, at home, by the Asian International Arbitration Centre.

Expedited arbitration has become popular for understandable reasons. There are significant advantageous in terms of the time and expense saved. Apart from which, the ability to resolve a dispute using a documents-only procedure has been found to be both convenient and effective. Furthermore, with the introduction of statutory adjudication for construction disputes in several Commonwealth jurisdictions in recent years, parties have become increasingly aware that disputes may be resolved quickly and with little expense without the quality of the decision being impaired.

The University Arbitration model is novel, as it builds on this idea of expedited arbitration, by including provisions for:

(1) the courts of Malaysia to refer disputes to arbitration;

(2) such an arbitration to be presided over and determined by an arbitrator drawn from a panel of arbitrators comprised of, inter alia, members of university faculties;

(3) disciplinary proceedings against such arbitrators, in the event of inappropriate conduct; and

(4) the publication of the awards made by these arbitrators.

These new provisions introduced by the University Arbitration model will be beneficial in many ways. Firstly, the ability of the courts to refer disputes to arbitration will encourage parties to adopt the University Arbitration model, particularly for small claims in the subordinate courts of Malaysia. Secondly, developing a panel of arbitrators comprised of experts from universities, who have also been trained as arbitrators, will ensure that disputes are resolved by persons who have expertise in the subject matter of the dispute. For example, a construction dispute may be determined by a Professor from the engineering faculty of a University, who has also been trained as an arbitrator. Thirdly, the availability of disciplinary proceedings will guarantee that the very highest ethical and professional standards are maintained in the arbitral proceedings. Finally, the publication of the awards will allow for the development of the law.

We look forward to working together on the development of the University Arbitration model and to seeing its full potential realised in Malaysia and around the world.

Yours sincerely,

Thayananthan Baskaran
Chairman
Chartered Institute of Arbitrators, London
(Malaysia Branch)

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CONCEPT PAPER*

EMPOWERING UNIVERSITIES AS ARBITRATION CENTRES: A GLOBAL PERSPECTIVE

by
Justice Datuk Dr. Haji Hamid Sultan Bin Abu Backer!
and
Arun Kasi†

ABSTRACT

A proposal for research to be done to empower Universities as Arbitration Centre or Arbitral Institution as conceived and advocated by Dr. Hamid Sultan bin Abu Backer. This paper invites consideration of the proposal by stakeholders of Alternative Dispute Resolution (ADR - arbitration, mediation, adjudication, etc.) and universities globally. The paper proposes that universities should be empowered as Arbitration Centres or Arbitral Institutions and the talents from various faculties of the universities to be allowed to sit as arbitrators, mediators, adjudicators, etc. (subject to formal training) and if feasible, university premises to be also utilised as hearing centres. It is also being suggested that (i) legislation is made for courts to refer suitable cases fit for ADR to approved and/or participating universities; (ii) existing arbitral institutions or relevant bodies provides guidance and training support for 'University Arbitration'; and (iii) laws are amended to provide for arbitration clause and 'University Arbitration' in relation to suitable civil and commercial contracts.

Based on this concept, a suitable scheme can be formulated to provide for court annexed arbitration wherein

* Revised, 24 October 2018.

! Judge of Court of Appeal, Malaysia; author of *International Arbitration with Commentary to Malaysian Arbitration Act 2005,* Kuala Lumpur, Janab Law Publications, 2016.

† Advocate and Solicitor of High Court of Malaya; Fellow of Chartered Institute of Arbitrators, London; author of *Arbitration: Stay of Court Proceedings and Anti-Suit Injunctions*, Kuala Lumpur, CLJ Publication, 2014.

parties to litigation choose an arbitrator from the pool of university arbitrators or judicial officers.[1]

UNIVERSITIES AS ARBITRATION CENTRES

Universities have a great unexplored potential to provide ADR services. Their lecturers, professors and visiting professors and lecturers as well as retired faculty members will qualify to sit as arbitrators, mediators, conciliators, adjudicators, etc. (subject to formal training). They have the facilities, support staff and diversified talents to conduct arbitrations and other ADRs including those technical in nature. Tapping their talents into administration of justice will relieve courts of the corresponding workload and thus save public money and limited resources. In addition, it will also expose the students to the benefit of ADR at an early stage to arrest a litigious society. Further, the public opting for 'University Arbitration' is more likely to face less stressful atmosphere in contrast to city based Arbitration Centres and there is also a possibility of conducting the arbitration hearings outside working hours and on holidays. It will also generate extra income for universities, staff as well as participating faculty members.

The two setbacks that hold disputants from going to arbitration are high cost and long delay involved in arbitration. Both these setbacks can be overcome in 'University Arbitration'. This paper is a proposal for global consideration and adoption of an alternative system of arbitration and other ADR mechanisms, under the caption 'University Arbitration', which is proposed to be an effective, economical and expeditious alternative to litigation and to take arbitration to next level.

The advantages in arbitration as opposed to litigation are many. In essence, administration of justice in both differs. In litigation, common law courts are concerned with what is right according to Rule of Law and not

1 This paper is dedicated to the faculty members and students of: (i) The Middle East Institute (MEI) of National University of Singapore; (ii) International Islamic University Malaysia (IIUM); (iii) Damodaran Sanjivayya National Law University (DSNLU), Visakhapatnam, India; and to Dubai International Financial Centre Court (DIFC). Special thanks to H.E. Justice Shamlan Al Sawalehi of DIFC; Former Chief Justice of Malaysia and now Judge at DIFC, Tun Zaki Azmi; Justice Lim Chong Fong of Malaysia, Justice Dato' Mah Weng Kwai, former Judge, Court of Appeal Malaysia; Dr. Eng Seng Ho (MEI) of National University of Singapore; Dr. Ashgar Ali, Dean of Law IIUM; Dr. Rani Kamarudin (IIUM) and Dr. Venkat Iyer (U.K.). Acknowledged are the contributions made or to be made by S.V. Parvin Rathinam and V. Saratha Devi, Advocates and Solicitors of High Court, Chennai, Appukutan, Nizam Basir, Thaya Bhaskaran, Dinesh Bhaskaran, Advocates and Solicitors of Malaysia and Dr. Umar A. Oseni for the dissemination of this paper to all relevant stakeholders globally and also to obtain reviews from the relevant jurists. Consent is given to all to publish this paper in arbitration and/or law journals, etc. in the 'pursuit and dissemination' of knowledge.

necessarily what is just. For example, if rules of pleadings, evidence, etc. are not complied with strictly, the courts may not provide substantive justice. In arbitration, procedural methodology is less stringent and the arbitral tribunal as far as practical will move towards what is right as well as just taking into consideration the dispute before them. Further, party autonomy plays an important role. That is to say, the parties can choose the arbitrator, the law, rules, seat, etc. These choices are not available in litigation.

EMERGENCE OF MODERN COMMERCIAL ARBITRATION[2]

Resolution of disputes through arbitration and other alternative dispute resolution mechanisms have been in practice for centuries and the jurisprudence and methodology have been evolutionary in nature and is still continuing to be so. Historically, common law courts were slow in recognising arbitration as an effective medium of dispute resolution. As a result, arbitration did not gain popularity as an effective dispute resolution mechanism.

The first milestone in making arbitration an effective dispute resolution mechanism was the New York Convention, 1958[3] (the "Convention"), which is the birth place of the modern arbitration. The Convention required the States which subscribed to it to enact laws to recognise an arbitration agreement in writing and at the request of any party refer the parties to arbitration[4]. It also required the member States to recognise an arbitral award made in a foreign State[5] as binding and to enforce it[6]. The Convention, although imposed an obligation on the member States to enact the necessary laws, did not itself guarantee that an arbitral award made in one State will be enforced in another member State. The arbitration referred to in the Convention included civil and commercial arbitrations.

The success of the Convention was limited. Although the Convention, when enacted as a law in any member State, required recognition of arbitration agreements and of foreign arbitration awards, it did not provide the full framework to facilitate an effective arbitral process such as provisions for interim measures, appointment of arbitrators and challenge thereto, competence of the arbitral tribunal to deal with matters touching their jurisdiction, determination of rules of procedure and

2 See Hamid Sultan Bin Abu Backer, 'Birds Eye View of International Arbitral Process: Malaysian Chapter', *KLRCA Newsletter* #19 / July-Sept 2015.

3 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

4 Article II of the Convention.

5 The Convention allows member States to limit its application of the Convention only to other contracting States on grounds of reciprocity (Article I(2) of the Convention).

6 Article III of the Convention.

administration of the rules including issues as to default awards, court's assistance in taking evidence, etc. As a result, the Convention, by itself, was not instrumental in promoting and encouraging settlement of disputes by arbitration as a matter of choice of parties. Courts, even after their respective State has subscribed to the Convention, were readily interfering in the process of arbitration and with arbitral awards. In consequence, the growth of arbitration as an effective dispute resolution mechanism was curtailed.

At this juncture, as the second milestone, came the UNCITRAL Model Law, 1985 (amended in 2006)[7] to advance the objective of the Convention. The Model Law was a model template for a full-fledged arbitration statute for member States to adopt with desired modification. The Model Law provided the full framework for an effective international commercial arbitration. It was not part of the Convention obligation on the member States to adopt the Model Law, but it was a convenient model for member States to adopt. Another benefit delivered by the Model Law was that it provided uniformity in arbitration laws[8] across the member States that in substance adopt the Model Law[9]. The arbitration referred to in the Model Law was only related to international commercial arbitration[10].

The Model Law saw a leap in the takers with keen interest to promote arbitration as an effective alternative dispute resolution mechanism. A number of States adopting and enacting the Model Law had taken an added advantage of it by rendering the enactment also applicable to international arbitration as well as domestic arbitration, whether it be civil or commercial[11]. Many countries have now subscribed to pro-arbitration and pro-ADR policy and promote arbitration and other ADRs as effective mechanisms to resolve disputes.

At present, about 157 States have subscribed to the Convention, of which about 75 have in substance adopted the Model Law by enacting laws substantially based on the model. Such countries are called Model Law countries. Number of States subscribing to the Convention and adopting the Model Law is in continuous growth.

7 Model Law limits its own application to international commercial arbitrations. However, there is not anything that will stop a Member State from making the provisions made in line with the Model Law to be applicable also in other arbitrations.

8 Applicable to international commercial arbitration.

9 Such States are called 'Model Law Countries'.

10 In contrast, the arbitration referred to in the Convention covered both civil and commercial arbitration. It applied to enforcement of all foreign awards covering both domestic and international arbitrations. It also applied to enforcement of an award made domestically in an international arbitration.

11 E.g. Malaysian Arbitration Act 2005.

This has resulted in more and more standard form contracts including arbitration clauses. Inclusion of arbitration clause has now almost become inevitable in international agreements, construction contracts and shipping contracts. The growth of domestic as well as international arbitration now, is geometrical. Hence, the need to get all the talents available to participate in meeting and managing the needs created by the growth.

SIGNIFICANCE OF ARBITRATION[12]

The significance of arbitration is multi-fold. From the parties' perspective, it facilitates the disputes between them being resolved by arbitrators appointed by them, if necessary, by experts in the relevant technical field. Parties may choose the applicable seat, law and procedure. The award is binding and final, and is not generally appealable. It is private and can be confidential too. The award can be registered[13] and enforced as a judgment of court in the wide number of member States of the Convention. This is an un-matching benefit of resolving disputes in international transactions through arbitration, whereas a decision of court may only be enforced in the country in which the order or judgment of the court was made and in the countries with which the country has reciprocity arrangements for registration and enforcement of judgments[14].

From a State's perspective, development of arbitration relieves the courts of the caseload which would otherwise be on the courts. When parties resolve their commercial disputes by private forum, i.e. arbitration, public money and limited resources available to administer justice are saved. The courts, thus relieved of a part of their workload, can dispense justice in the needy cases before it in timely manner.

It must be noted that in many countries, the courts are overloaded with cases and the resources including human resources available to deal with them are vastly in shortage. That results in the timeline for disposal of cases to many years. In some countries, it would not be a surprise that a case may take 10 or 20 years to hit the day of trial. At this juncture, it is worth recalling the popular legal maxim "justice delayed is justice denied". An effective distribution of business between courts and arbitral tribunals will make available resources of the court to be effectively employed in administrating justice in a speedy manner in deserving cases, which may be of public or constitutional importance.

12 See Hamid Sultan Bin Abu Backer, 'Astro Lippo: Is 'Passive Remedy' An Anathema to the Enforcement of the International Arbitration Award? - Malaysian Chapter', *KLRCA Newsletter* #20 / Oct – Dec 2015.

13 Judgment of court can be entered in terms of an award made by arbitral tribunal.

14 E.g. Reciprocal Enforcement of Judgments Act 1958.

The benefits of arbitration in administration of justice are abundant. The Model Law is effective in promoting arbitration. However, that is not without limitations and setbacks. Some of the prime setbacks are as follows: (i) high cost of arbitration, which includes the fee of arbitrators and arbitral institutions; and (ii) long time required to complete an arbitration, which is inevitable particularly when busy practitioners in respective fields are engaged as arbitrators and more so when more than one arbitrator is appointed to the arbitral tribunal hearing a particular matter.

Finding an effective solution to address the setbacks of arbitration will take arbitration to next level and correspondingly relieve courts of workload and reduce the funding required to operate courts.

EMPOWERING UNIVERSITIES AS ARBITRATION CENTRES

One of the key benefits of resolving disputes through arbitration is that parties may appoint experts in the relevant field as arbitrators, whether as a sole arbitrator or as a co-arbitrator. Arbitration centres have diversified talents in their panel of arbitrators, such as civil engineers, electrical engineers, architects, lawyers, etc. In jurisdictions subscribing to common law courts, judges have been well trained to handle technical cases with the assistance of expert evidence. However, this may not be the case in many other jurisdictions, where the legal framework of the country or its judges may not be well equipped to hear technical matters. Most of the well-established state universities will have the necessary talent. Lecturers and professors inclusive of visiting professors and lecturers at universities will potentially have the ability and time to act in ADR matters. 'University Arbitration' will tap the vast talents available in the universities into administration of justice.

An arbitral institution, apart from having talented arbitrators in its panel, must be able to provide the venue and facilities for conduct of arbitration hearings. Universities generally will be able to meet this requirement, as they will have the space and facilities within their premises to provide suitable venue for the conduct of hearings. More, universities will generally be able to offer such facilities even at flexible hours.

Another key benefit of 'University Arbitration' is that the cost can be significantly lower than that incurred in conventional arbitral institutions. The fee charged by the universities for administration and for provision of venue and facilities within their premises can be nominal compared to conventional arbitral institutions. Similarly, the fee charged by the lecturers, professors, etc. can be considerably less than that charged by practitioners.

The faculty members upon proper training as well as exposure to ADR over a short period of time will be able to handle the most complex ADR cases in parallel to conventional arbitral institutions. The system subsumed in the Convention, the Model Law and the Model Rules[15] are in principle sufficient to promote 'University Arbitration'.

Delay in arbitration can be overcome with 'University Arbitration' as lecturers, professors, etc. may be readily available than busy practitioners. There can be more flexibility in the time of conduct of proceedings, as the lecturers and professors may be willing to have arbitration hearings even out of office hours or even in weekends.

In effect, empowering universities as centres for arbitration and other ADRs will effectively evolve arbitration and other ADRs as an effective, economical and expeditious alternative to litigation.

IMPLEMENTING 'UNIVERSITY ARBITRATION'

The first step in implementing 'University Arbitration' is to develop a model rule in general for 'University Arbitration' based on the UNCITRAL Arbitration Rules (as revised in 2010). A scale of fee for the university arbitrators and the university as the institution administering the arbitration should be incorporated as a schedule to the rules. The scale should be much lower than the scale found in conventional arbitral institution rules. The scale must provide an affordable arbitration for the parties, i.e. an effective, economical and expeditious alternative to litigation, and at the same time a reasonable extra revenue for universities, lecturers, professors, etc.

The second step is to have a small secretariat to administer arbitrations. It may not be necessary to separately man this secretariat, but initially arrangement can possibly be made for the staff in some departments or faculties to act as the secretariat.

The third step is to train the interested university lecturers, professors, etc. with a specially moduled certificate course to enable them to act as university arbitrators, mediators, adjudicators, etc.

The fourth step is to develop a separate website for the university's arbitration centre with information usually sought by parties. Such information should include information of their lecturers, professors, etc. in the university's arbitration panel.

BENEFIT TO STAKEHOLDERS

To lecturers, professors, etc., 'University Arbitration' will provide an avenue for additional revenue by employment of their expertise in their respective fields in the administration of justice.

15 UNCITRAL Arbitration Rules (as revised in 2010).

It will expose the lecturers, professors, etc. to administration of justice related to the relevant field of their expertise and to the practical problems and issues arising in the practice of the relevant field. It will have direct impact in teaching of the subjects in the universities as the faculty will not only have academic strength but also practical exposure. This in turn will enhance teaching as well as knowledge in an informed manner. Further, this exposure, through the medium of teaching by the lecturer, professor, etc., will have an impact on the students in their academic as well as practical development and it will help them to understand and appreciate ADR at the early stage itself.

Conventional arbitral institutions[16] can play a role by providing training to the university arbitrators, by making rules for 'University Arbitration', by acting as point of internal reference and guidance to university arbitrators in the matter of arbitral procedures. For example, countries in the Middle East, Arbitral Institutions and Courts such as DIFC Courts in Dubai can play a vital role in the project of empowering universities as arbitration centres by providing training and continued guidance and support to participating university arbitrators and assisting them to ensure that they deliver an award particularly enforceable in all the Middle East countries.

THE 'FEEDER' TO UNIVERSITY ARBITRATION

The above stated steps will complete the setting-up and making of the infrastructure for universities to act as arbitration centres and their lecturers, professors, etc. in the relevant fields to act as arbitrators. This set-up will be a new dimension in the development of arbitration and an establishment of a new regime in arbitration. The next question is who will feed this new regime arbitration?

The 'University Arbitration' can be fed in the regular way by agreement of parties to submit to a university arbitration. The reason the parties to an agreement may opt for 'University Arbitration' is that it will be cost and time effective, while getting the talent is not compromised. The 'University Arbitration' may capture matters which would otherwise not go into arbitration on account of high cost and time involved but would go into courts. This will effectively reduce the workload in courts. However, the parties-feeding alone may not be sufficient to take fair advantage of the potential of 'University Arbitration', particularly this being a new regime in arbitration. Hence, it is proposed that a system of courts feeding the 'University Arbitration' must be implemented.

Such a system of courts-feeding can be implemented in a number of ways and in stages. At first stage, courts may encourage parties, in respect of matters

16 Such as SIAC, HKIAC, etc.

before them with a dispute involving an amount or subject matter whose value does not exceed a certain sum, to go for 'University Arbitration'. This can be done in the same way as the courts generally encourage, during case management conferences, settlement by mediation.

It must be remembered that the court's intervention in this manner can be effective as the power to award costs, if the matter proceeds at the court, is with the court. This must particularly be so in cases where the court suggests 'University Arbitration' in a matter which can suitably be arbitrated through 'University Arbitration' and the parties or one of them refuse to agree for the same.

To facilitate a practice of courts encouraging 'University Arbitration' in suitable matters where the amount in dispute or the value of subject matter does not exceed a certain sum, issuance of a practice direction to that effect should be issued. Similar amendment to the relevant rules of court will be desirable[17].

Such a practice implemented in courts will, in the passage of time, encourage lawyers and litigants to consider commencing their actions at the 'University Arbitration' centres by agreement of their adversaries.

At second stage, necessary modification can be done to the relevant statutes[18] to enable the courts to stay the proceedings before them on their own motion or upon application of a party and refer the parties to 'University Arbitration' subject to certain conditions. Below is a model for such a statutory provision:

> Power of court to refer to arbitration
>
> When the amount in dispute or the value of the subject matter does not exceed the amount prescribed therefor by relevant practice direction and the court is satisfied that it is a proper matter to be resolved by 'University Arbitration' taking into account:
>
> a) the issues involved;
>
> b) complexity of the case;
>
> c) the potential cost and time that will be involved by arbitrating at university arbitration;
>
> d) ability, and where applicable, commercial viability of the parties to bear the cost that will likely be involved by arbitrating at university arbitration;
>
> e) availability of a university which will be able to provide the facilities for the 'University Arbitration' in the vicinity of residence or place of business, as applicable, of the parties,

17 In the Malaysian context, O.3 4 r. 2(2)(a) of the Rules of Court 2012.

18 In the Malaysian context, Courts of Judicature Act 1964 and Subordinate Courts Act 1948.

their counsels, and the court in which the action has been filed;

f) potential availability of suitable university arbitrators in the university to hear and decide the matter;

g) balance of convenience;

h) any prior agreement between parties to submit the dispute to arbitration, in beach of which the action was instituted before the court, and the defendant failed to apply for stay of court proceedings before taking any step in the proceedings that will disentitle him to apply for such a stay.

i) such other matter as may appear to be relevant to take into consideration in the circumstances of the case

the court may on its own motion or upon application of any party refer the parties to 'University Arbitration' and may impose such conditions as it deems fit.

Such a statutory provision should be supplemented by a strong practice direction and/or rule to the effect that the courts shall consider at case management conference the suitability of the case to be referred to arbitration under the statutory provision.

It must be noted that such a statutory provision will take arbitration to next level since such an arbitration may be directed irrespective of agreement of parties. However, such a leap has been proposed only with appropriate safeguards, namely, the reference is at the discretion of the court and secondly the relevant preconditions must be satisfied before the court may exercise the discretion.

In this context, it must further be noted that compulsory submission to a particular tribunal is not something new to the legal system in a number of countries. A number of countries have legislated construction industry payment and adjudication statutes, which allows the contractor to institute adjudication claim against its employer for payment for work done or services rendered under a written construction contract[19]. These actions will be instituted in the appointed arbitral institution, wherein the adjudicator will be appointed by the parties or the arbitral institution. The adjudicator will make a decision binding on the parties, which decision can be registered and enforced as a judgment of court.

REGIMES OF ISLAMIC FINANCE AND OBOR[20]

Disputes in Islamic finance regimes will be a potential feed for 'University

19 E.g. Malaysian Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012).

20 See (i) Hamid Sultan Bin Abu Backer, "Malaysia As A Choice Jurisdiction For Dispute Resolution in the Global Islamic Finance Industry", Current Law Journal, *LNS Articles*, [2016] 1 LNS(A) xcviii; and (ii) Hamid Sultan Bin Abu Backer,

Arbitration'. The regular judiciary or even regular arbitral institutions may lack or have limited talent in dealing with disputes of this regime. Lecturers, professors, etc. from the relevant Islamic faculties will be one of the most suited arbitrators to determine such disputes. Financial Institution, be it Islamic or conventional, will welcome 'University Arbitration' if legislation is in place to say that, where the financial institution has advanced money to the borrower, it is incumbent upon the arbitral tribunal to ensure, in the event the arbitral tribunal holds the finance facilities to be invalid for any reason, that the money advanced by the financial institution to the borrower is directed to be repaid with assessment of damages for the period the money or any part of it was held by the borrower. Thus, any defence pleaded by the borrower that the facility is tainted with illegality or is against public policy, even if it succeeds, will neither help the borrower to keep the money nor avoid having to pay compensation for the period for which the money was in his hands.

Similarly, disputes arising from One Belt One Road (OBOR) are potential feeds for 'University Arbitration'. There is a potential to hold discussion with relevant stakeholders to develop universities as preferred centres for arbitrating these disputes. 'University Arbitration' will be one of the best options in countries where the legal framework is not conducive to deal with technical issues arising from OBOR related matters.

CONCLUSION

Universities have a great unexplored potential to act as arbitration centres at affordable cost. Utilising the potential, whether by way of parties-feeding or courts-feeding, will encourage and enable parties to settle their disputes through 'University Arbitration'. The 'University Arbitration' will particularly cater for matters which would otherwise go to court rather than to conventional arbitral institutions on account of cost and time factor. 'University Arbitration' will be an effective alternative not only to dispute resolution by courts but also, in some cases, to arbitration at the conventional arbitral institutions.

It would thus relieve the courts of workload which would otherwise be on the courts and free the resources of the courts to be available for the needy, to enable speedy resolution of matters before them and to save public money too. It is appealed to the universities, rule makers and law makers to seriously consider and make-happen 'University Arbitration'. The idea and suggestions advocated in this paper may appear to be new and revolutionary, but when seen in the proper perspective, it will be practical. If it is implemented, it will also enhance the administration

"Arbitration Clause in Islamic Finance Facilities", *LNS Articles*, [2016] 1 LNS(A) xcvii.

of justice as well as benefit the public. It will benefit countries where court process is perceived to be slow or ineffective and also countries where costs of Institutional Arbitration and/ or litigation for small claim (domestic claim) are perceived to be high.

This scheme will attract greater public support if parties to litigation are allowed to opt for university arbitrators or judicial officers of their common choice to arbitrate their disputes, facilitated by the court including provision of court premises for conduct of the arbitration.

This paper calls for due research and consideration as well as conferences and debates from the stakeholders related to ADR as well as litigation to formulate the law and rules for 'University Arbitration' to evolve as one of the preferred modes of dispute resolution in civil and commercial matters according to the needs of the country.

RESEARCH PAPER AND SURVEY RESULT

THE NEW YORK CONVENTION 1958 AND UNCITRAL MODEL LAW 1985 DOES NOT CATER FOR THE 'MAN ON THE STREET': IS UNIVERSITY ARBITRATION THE WAY FORWARD IN ADR?

by
Justice Datuk Dr. Haji Hamid Sultan Bin Abu Backer
Judge, Court of Appeal Malaysia

ABSTRACT

'University Arbitration', a concept conceived by the author, in principle proposes that courts utilise the talents of faculty members in universities for the purposes of arbitration, mediation, conciliation, adjudication, etc. (ADR). The concept if implemented in any country will reduce government expenditure on courts and help clear backlog of cases before the courts. It can be a new source of revenue for universities and their faculty members. The long-term results include paving way to building a non-litigious society. Further, it will also help to meet dispute resolution demands related to the 'One Belt, One Road' (OBOR) initiative.

This paper will highlight that the present practice of arbitration and its module as implemented in many countries based on the convention and the model law is related to disputes where parties by agreement have agreed to settle their disputes by arbitration. The present module does not cater for disputes filed in courts. Further, it is neither cost-effective nor user-friendly for parties to resort to it when the quantum of the dispute is small such as below one million by value of the currency. This paper advocates that 'University Arbitration' is the way forward in ADR. It will attempt to propose a simple methodology relating to its practical application to appreciate the concept alongside its benefits. The concept proposes a mechanism that is cost-effective and

user-friendly, in contrast to litigation. The methodology suggested below needs further research and appropriate consultation with stakeholders for the formulation of laws, rules, etc. for its effective implementation.[1]

HISTORICAL DEVELOPMENT IN ADR

(A) RELIGIOUS TEXT

Dispute settlement by way of ADR had been in vogue from time immemorial and was also the recommended mode of dispute settlement injuncted in various religious texts. The methodology then was communal in nature. The decision of the arbitrator or settlement reached in mediation, etc. was internally recognised by the community and made enforceable by way of self-regulation without the assistance of the state and/or its authorities.

(B) ORGANISED GOVERNMENT

Upon the coming into existence of organised government in various states, a complicated methodology of dispute settlement was introduced by respective states. These disputes were heard by government-appointed adjudicators who held portfolios as magistrates, judges, etc. Along with this mode came complex trial procedures with evidential rules, procedural rules on lodging appeals, etc. that required the litigant to seek representation from men schooled in law. In consequence, litigation became an expensive mode of settling disputes; notwithstanding the courts adjudicating process was provided by the states for a nominal fees to sustain access to justice.

(C) COMMON LAW WORLD

The common law world in the last millennium has developed a complex methodology of administering justice where the substantive rights of the parties are often of secondary importance to the judge when rules of procedure, pleadings or evidence, etc. are not satisfactorily dealt with by counsel. Common law judges were never schooled to take an inquisitorial approach to deliver justice. The game of justice was played on the field of adversarial justice where the man who can afford the best of lawyers may stand a higher chance of success than the other party represented by a mediocre lawyer who may be less informed in the workings of the law, practice, and procedure related to the trial.

(D) STATUTES AND SHORTCOMINGS

The common law world had introduced legislation in the last few centuries

1 The author has conducted survey of the concept in Malaysia and Singapore, largely with faculty members, prominent counsels, etc, the result whereof has been extremely positive. Generally, all participants took the view that the concept should be implemented as court annexed university arbitration facilitated by the court taking advantage of the university talent for the start.

to allow courts to recognise arbitral awards and provide a mechanism for enforcement of them. Notwithstanding these provisions for arbitration and enforcement of awards, many common law judges were jealously guarding their jurisdiction. They were liberally interfering with the awards made by arbitrators despite parties having demonstrated their clear intention to settle by arbitration, thereby wanting to keep away from the courts and the complicated legal bureaucracy applicable to court actions. In addition, these judges declined to recognise the importance of party autonomy which is central to the tenets of arbitration. Even in this day and age, some common law judges take the view that arbitration mode will not assist in developing English commercial law. It is well recognised jurisprudence that litigants approach the courts to obtain justice for themselves and not for the purported development of English law or any law of a country. In addition, case law will demonstrate that courts have not delivered substantive justice in many civil and commercial cases due to the procedural and/or evidential and/or technical objections, etc. taken in such cases. If the same cases had been dealt with by arbitral tribunals where the procedural methodology is less stringent than at a court trial, the arbitral panel would be more likely to deliver substantive justice as rules of pleadings, procedure, and evidence are more flexible in contrast to the position in the courts.

(E) BACKLOG AND HIGH COSTS

Many jurisdictions experience a backlog of cases in courts and they may take up to 3 or 4 decades to dispose of cases. In countries where this is compounded with the high costs of litigation, it appears that litigation is no longer an option for the ordinary man on the street. This problem was recognised by the United Nations as civil and commercial matters were increasingly litigated in courts due to rapid economic development in most parts of the world after the Second World War. In consequence, the New York Convention 1958 (Convention), and subsequently the UNCITRAL Model Law 1985 (Model Law), were introduced to encourage arbitration. Some of the shortcomings of the Convention and Model Law are that:

i) they do not pave the way for courts to direct ADR in suitable cases; and

ii) they do not focus on creating a methodology for dispute settlement that will necessarily be cost-effective, expeditious and speedy for the ordinary man on the street.

The simplicity of the Convention and UNCITRAL Model Law is that:

i) parties can choose to settle the dispute by arbitration and also designate the law, rules, etc. and can appear in person and present the case or appear with / through their representative or lawyer;

ii) after hearing the parties, witness, etc. the arbitrator will deliver the award; and

iii) the award *per se* cannot be challenged except on limited grounds but the arbitral process can be.

(F) OBOR AND ARBITRATION

The One Belt, One Road (OBOR) initiative by China is likely to increase foreign investment in many countries which will lead to infrastructure development. Disputes in investment as well as related to construction of infrastructure will necessarily increase the workload of those involved in dispute resolution mechanism of the country. Arbitration being one of the modes of dispute resolution mechanism is likely to increase in leaps and bounds. To cope with the demand, 'University Arbitration' may be an effective and economical solution in the near future.

(G) CONVENTION AND MODEL LAW

The Convention paved the way for civil and commercial matters to be dealt with by arbitration and for its award to be made enforceable in all Convention countries. In simple terms, the Convention gave effect to the party autonomy concept. Parties to an arbitration agreement can refer their disputes to an arbitrator who may even be a tribal leader and his award can be made enforceable in all Convention countries.[2]

(H) CONVENTION AWARD AND ENFORCEABILITY

The shortcoming was that the arbitral award from a Convention country was not easily enforceable when the respondent to a dispute took objections to the award. In that sense, the arbitration mode was not seen to be a popular form of dispute settlement mechanism. Subsequently, the United Nations Commission on International Trade Law recommended the Model Law for commercial disputes with provisions for the respective states' 'seat' courts to supervise the arbitral proceedings so that the arbitral tribunal will deliver an award which can be enforced in the Convention states.[3]

(I) PROGRESS

The Model Law methodology encouraged the growth of arbitration as a viable alternative. As a result, more arbitral institutions were established to cater for this increase in demand for arbitration proceedings. The state laws on arbitration in many countries incorporated the

2 See Hamid Sultan Bin Abu Backer, 'Birds Eye View of International Arbitral Process: Malaysian Chapter', *KLRCA Newsletter* #19 / July-Sept 2015.

3 See Hamid Sultan Bin Abu Backer, 'Astro Lippo: Is 'Passive Remedy' An Anathema to the Enforcement of International Arbitration Award? Malaysian Chapter', *KLRCA Newsletter* #20 / July-Sept 2015.

Model Law for domestic as well as international arbitration. However, there was no recourse for a party to facilitate the dispute be referred to arbitration when the parties had not submitted to arbitration by a prior agreement.

(J) SUBORDINATE COURTS AND CLAIMS

Although arbitration has gained popularity as a dispute resolution mechanism in most of the Convention countries, its costs are often viewed as exorbitant for claims which are ordinarily dealt with by Subordinate Courts. In most jurisdictions, the majority of cases filed in courts may relate only to claims in Subordinate Courts as opposed to the High Court. Most of these claims will be related to the ordinary man on the street. These cases may only relate to claims below a a certain low threshold amount such as one million in currency value of that country, for example, Ringgit Malaysia, Singapore Dollar, US Dollar or British Pound, etc. The value of money and its purchasing ability has decreased over the years. Basically, with one million ringgit or one million Singapore Dollars, etc. one can only buy an apartment or condominium in the city and it is very unlikely even for a terrace house located near city centre to be purchased for that money. It is difficult to see why such small claims cannot be arbitrated through the expertise of 'University Arbitration' as opposed to subordinate court adjudicators. In addition, a proper survey may show that the asset value of an average man on the street will be less than one million in their currency value or at worst negative in value. It may not be financially prudent for him to opt for institutional arbitration which is said to be costly for various reasons. For example, the panel of arbitrators from an arbitral institution will usually comprise of distinguished personalities and those who are senior in practice. Consequently, the rates for their engagement as well as the administrative fees are high, especially if the institution is a prestigious one.

(K) ECONOMICAL OPTION

In the present dispute settlement structure, the ordinary man on the street has no option but to rely on the courts. The court process, as said earlier, is very challenging and the cost of employing a lawyer is becoming exorbitant. In addition, Subordinate Courts which largely deal with disputes worth less than one or two million in currency value of the respective country are inundated with cases, thus being unable to provide expeditious justice. In this context, it will be most welcoming for the man on the street if the state introduces a mechanism for suitable matters to be referred to ADR. Such a mechanism should be subject to reasonable costs and be able to provide an efficient, expeditious, and reliable mechanism for dispute settlement. 'University Arbitration' is an appropriate solution in this regard.

'UNIVERSITY ARBITRATION' (UNIVERSITY CUM COURT ANNEXED ARBITRATION)

(A) FACULTY MEMBERS

Universities are generally blessed with competent faculty members who are specialists in their respective fields. They can be trained as potential arbitrators. They will be able to hear a wide range of disputes such as those encompassing intellectual property, construction disputes, negligence, trusts, company law, inheritance, etc. Some of the faculty members and/or retired faculty members may even be prepared to sit as an arbitrator on a *pro-bono* basis in deserving cases and/or accept only a nominal fee as part of national service to assist in the administration of justice.

(B) SUB-COURTS – LACK OF EXPOSURE

A magistrate or Subordinate Court judge may not have the necessary exposure to all areas of law. It is beyond doubt that whatever cause of action it be, experts in the related field will be available in the universities to hear the dispute and deliver substantive justice. In addition, the universities also have sufficient infrastructural facilities to accommodate ADR hearings and charge fees for their services, which will be much lower than the conventional arbitral institutions.

(C) COMPULSORY ARBITRATION OR ADR

Generally, arbitral proceedings are commenced by agreement of parties. If one party or both parties do not agree to arbitrate their dispute, there is very little the courts can do. However, there is nothing to stop the state to compel parties to settle by arbitration or ADR for matters which can be suitably referred to University arbitrators. In fact, there already exists legislation which provides for arbitration or adjudication for matters which were traditionally heard by the courts through tribunals, arbitrator, adjudicator, etc.[4]

(D) ALTERNATIVE TO COMPULSORY ARBITRATION

Courts, in coordination with Universities and faculty members, can provide a cost-effective package for litigants who has filed a suit in the courts to proceed with dispute resolution through the 'University Arbitration' process. A proper module without legislative amendment which will be workable can be formulated within the framework of the existing laws in Model Law countries, such as Malaysia, Singapore, India, etc. unless the laws of the state do not allow faculty members to participate in ADR work.

4 Eg. Constructions payment disputes heard by Adjudicators pursuant to statutory authority such as that under the Malaysian Construction Industry Payment Adjudication Act 2012.

(E) SURVEY QUESTIONS AND REPORT

From the survey conducted in eight public universities in Malaysia offering law, it was found that the faculty members inclusive of their deans wanted the scheme to be implemented immediately. In addition, some of the faculty members even indicated that they do not mind doing the same on *pro bono* basis as it exposes them to the practical side of subject that they teach. Generally, they were not concerned much about their remuneration in this scheme, but they were more concerned with the experience that the scheme will confer upon them. This scheme will in the long run facilitate their sitting in international arbitrations.

Survey in Singapore was not done with the deans and faculty members as how it was done in Malaysia. At the time the survey was conducted in Singapore, most of the faculty members were on vacation. Hence, only a handful of them were available. However, the survey in Singapore also covered some leading international arbitrators and prominent lawyers in Singapore. All of them were extremely positive about the scheme, although one or two had some reservation about implementation through Singapore universities but they had no such reservation if alumni of the universities (practising or non-practising lawyers or from disciplines such as engineering, architecture, medicine, etc) were engaged for this purpose. In essence, all of them were supportive of the concept.

The format of the survey questionnaire for Malaysia[5] was materially as follows:

SURVEY QUESTIONS
(Faculty Members - Malaysia)

(EMPOWERING UNIVERSITIES AS ARBITRATION CENTRES)

1.	Have you read the concept paper conceived by Datuk Dr. Haji Hamid Sultan bin Abu Backer?	Yes/No
2.	Do you think the concept can be implemented in Malaysia?	Yes/No
3.	Will Universities as well as faculty members agree to participate in it?	Yes/No
4.	Will faculty members attend courses to be certified arbitrators?	Yes/No
5.	Will it be a good idea for the University Arbitration scheme to be administered by professional bodies such as Bar Council and the AG Chambers, with the assistance of the participating University itself?	Yes/No
6.	Will the concept generate revenue for the University as well as the faculty members?	Yes/No
7.	Will the Government, Public, Judiciary, University faculty members and administering arbitral institution benefit from the concept?	Yes/No

5 The survey questions for Malaysia were formatted with a view to obtaining sufficient information that will facilitate formulation of University cum Court Annexed Arbitration Rules as well as fees and costs for Malaysia.

8.	Have you read the Draft Research Paper titled "The New York Convention 1958 and UNCITRAL Model Law 1985 Does Not Cater For the 'Man on the Street': Is University Arbitration the Way Forward in ADR?"	Yes/No
9.	Do you think the University faculty members will be prepared to be arbitrators in a pilot scheme on a *pro bono* basis?	Yes/No
10.	For a claim below one million ringgit, do you think the faculty members will be prepared for a start, to accept a fee per day sitting on the basis of ½ a day salary rate and another ½ a day salary rate for the University as well as administering institution for facilities as well as administration for each day of hearing?	Yes/No
11.	Will this concept and its application stand as a form of legal aid to access to justice for the Malaysian public?	Yes/No
12.	The concept if adopted by UNCITRAL and is made to be applied globally, will be a boon to administration of justice and is it likely to eradicate the vice related to backlog of cases in courts as well as meet the new dispute resolution challenges related to 'One Belt, One Road' (OBOR) initiative?	Yes/No

Name: .....

Comments: .....

The format for Singapore[6] was materially as follows:

SURVEY QUESTIONS
(Faculty Members - Singapore)

(EMPOWERING UNIVERSITIES AS ARBITRATION CENTRES)

1.	Have you read the concept paper conceived by Datuk Dr. Haji Hamid Sultan bin Abu Backer?	Yes/No
2	Have you read the follow up - Draft Research Paper titled 'Critical Thoughts On Arbitration (ADR): The New York Convention 1958 and UNCITRAL Model Law 1985 Does Not Cater For the 'Man on the Street': Is University Arbitration (University cum Court Annexed Mediation) the Way Forward in ADR?"	Yes/No
3.	Do you think the concept can be implemented in New York Convention and/ or Model Law countries?	Yes/No

6 The survey questions for Singapore were formatted to generally see what the response would be for the concept of University Arbitration and its implementation, without seeking information for formulating the University cum Court Annexed Arbitration rules, fees and costs for Singapore.

4.	Do you think if the concept made applicable in a country or globally will – i) reduce backlog of cases; ii) benefit faculty members as they will be able to earn extra income as well as practical exposure on the subjects they teach; iii) benefit the universities, as they will be able to collect fees or charges to facilitate arbitration in their premises; iv) benefit Arbitral Institutions, as they can charge a fee for administering the scheme professionally; v) benefit the public, as the costs of dispute settlement will only be nominal when contrasted with litigation; vi) University cum Court Annexed Arbitration will benefit the lawyers as it will reduce work stress in contrast to litigation; vii) the concept will help to instil on the public as well as among the students in all faculties the benefit of arbitration and/or mediation, and in the long run it will help to arrest litigious society; viii) the concept can be implemented with or without legislative amendments within the present legal framework of Model Law countries; ix) the concept will assist to meet with OBOR disputes in the near future.	Yes/No Yes/No Yes/No Yes/No Yes/No Yes/No Yes/No Yes/No
5.	Will it be a good idea for the University Arbitration scheme to be administered by professional bodies such as Arbitral Institution, Law Society and the AG Chambers, with the assistance of the participating University itself?	Yes/No
6.	Will this concept and its application stand as a form of legal aid to access to justice?	Yes/No
7.	The concept if adopted by UNCITRAL and is made to be applied globally, will be a boon to administration of justice and is it likely to eradicate the vice related to backlog of cases in courts as well as meet the new dispute resolution challenges related to 'One Belt, One Road' (OBOR) initiative?	Yes/No

Name: .....

Comments: .....

(E) ADVERSARIAL AND/OR INQUISITORIAL APPROACH

It will also be prudent and cost-effective when matters are referred to University Arbitrators based on their expertise on the subject matter of the dispute. To ensure substantive justice is foremost in the mind of the arbitrator the law should allow an arbitrator to take an adversarial and also an inquisitorial approach to reach the most just decision i.e. to deliver substantive justice, bearing in mind costs incurred and time spent.

An inquisitorial approach will help claimants and respondents to be guided by the arbitrator in providing the necessary evidence and witnesses to support their claim / defence. This approach will help parties to save costs incurred for legal representation. Lawyers too may choose to charge lower fees to represent parties as the task of delivering substantive justice is placed in the hands of the arbitrator in an inquisitorial system, as opposed to the judge and lawyers in an adversarial system. An inquisitorial approach can be included by agreement of parties and/or be provided for in the proposed rules related to 'University Arbitration'.

(F) SUGGESTED STEPS

For 'University Arbitration' to be successful and cost-effective, it must be modulated as court-annexed arbitration similar to court-annexed mediation. The courts must refer suitable matters to arbitration or other ADR processes. This can be done by a voluntary process and/or pursuant to amendments to relevant laws, rules, or practice directions. The suggested steps for arbitration by reference of courts may be as follows:[7]

i) The claimant files his claim in the court and serves it on the defendant;

ii) If the defendant decides to defend the action, he files an appearance. If no appearance is filed the claimant may proceed with the case and enter judgment in default;

iii) If the defendant wants to defend the action, he files his defence and in suitable cases he may also file an application to strike out the claim;

iv) Once appearance is entered, the claimant can seek leave of court to enter judgment if the respondent does not have a defence in law ;

v) If judgment is not entered, the court will look at the pleadings of the parties and in suitable cases refer the matter to be adjudicated by 'University Arbitration' scheme.

Proposed Procedure for 'University Arbitration'

i) Once the matter is referred to the participating University, the University appoints the arbitrator and informs the parties or provides an option for the parties to agree on the arbitrator from the panel of university arbitrators;

ii) The claimant attaches the relevant documents to the claim form and serves it on the arbitrator and the respondent;

iii) The respondent having served the claim form responds to the claim form and attaches the relevant documents to substantiate his defence;

iv) The University arbitrator having perused the claim form and

7 Steps (i) to (iv) are generally related to steps in litigation and steps (v) to (ix) are related to 'University Arbitration'.

the response, calls the parties for a conference and at the first instance suggests mediation or other mode of settlement if the matter can be so settled. If that option is not available or does not work, the arbitrator shall then guide the parties to furnish further documents or witnesses to establish their cases respectively, followed with suitable directions.

v) Relevant arbitral institution shall formulate the rules, etc. and administer the arbitral process.

(G) AWARD AND PROPOSED APPEAL PROCEDURE

An award of an arbitrator under the Model Law and/or Convention cannot be challenged in the courts for error of fact and/or law. However, matters related to the arbitral process may be challenged in international or domestic arbitration.

In most model law countries, when it comes to domestic arbitration, there has always been a small window to challenge the award on grounds of error of law or public policy. The threshold for challenge on public policy ground is very high for international arbitration. In domestic arbitrations, where there is a window to challenge on error of law, courts will be very slow to intervene on public policy grounds.

In Malaysia, domestic awards could be challenged for error of law under s. 42 of the Arbitration Act 2005, which is now in the process of being repealed or has been repealed. If it is repealed, the award can only be challenged on public policy grounds. In such event, the courts may be minded to apply a lower threshold for challenge under public policy ground for domestic arbitration. Otherwise, an unjust domestic award that does not subscribe to rule of law could become immutable. Under the constitution, it is the courts' paramount duty to ensure the arbitrator acts according to the rule of law. The deletion of s. 42 will give courts the wider power now to intervene on public policy grounds for domestic awards.

These proposed steps are only skeletal suggestions. They will be cost-effective and relevant if the necessary legislation or rules entrust the arbitrator with recourse to both the adversarial and inquisitorial approaches in order to reach substantive justice.

Basic views on Costs of University Arbitration

(A) PARTY-TO-PARTY COSTS; MALAYSIA: SCALE COST IN SUB-COURTS

In the Malaysian context, where there is a claim in court for a subject matter which has a monetary value of one million ringgit, the winning party is likely to receive an order for costs in its favour of about RM40,000.00 i.e. about 4% of the sum claimed. This includes the nominal court fees and a substantial portion of the party's legal

costs, including the fees payable to its lawyers.

Under the Court Annexed University Arbitration model rules for Malaysia (which is part of the scheme book here), the maximum cost that can be awarded is only half the cost that can be awarded under the Rules of Court 2012[8]. The parties may in the preliminary case management meeting even agree on no award as to costs.

(B) ARBITRATOR'S REMUNERATION

Under the Court Annexed University Arbitration Rules model for Malaysia, the arbitrator's remuneration is fixed at RM500 per day of sitting. The arbitrator will be paid for a minimum of 5 days' sitting, even if the actual sitting-days are less than that. At the same time, the maximum number of sitting-days for which the arbitrator will be paid his remuneration will be capped at 10 sitting-days.

This remuneration is applicable to cases in which the value or amount in dispute is not more than RM1,000,000. When the value of amount in dispute is more than that, the fee will multiply with multiples of the amount or value in dispute in brackets of RM1,000,000, unless parties and the arbitrator have otherwise agreed at the first preliminary case management meeting.

CONCLUSION

'University Arbitration' is the way forward to save costs, time, and to reduce the backlog of cases in courts. The scheme if made available in a country or globally will –

i) reduce backlog of cases;

ii) benefit faculty members as they will be able to earn an extra income as well as get practical exposure on the subjects they teach;

iii) benefit the universities, as they will be able to collect fees or charges to facilitate arbitration in their premises;

iv) benefit Arbitral Institutions, as they can charge a fee for administering the scheme professionally;

v) benefit the public, as the costs of dispute settlement will only be nominal when contrasted with litigation;

vi) benefit the lawyers as it will reduce work stress in contrast to litigation;

vii) very importantly, help to instil on the public as well as among the students in all faculties the benefit of arbitration and/or mediation, and in the long run it will help to arrest litigious society;

viii) be suitable for implementation with or without legislative amendments within the present legal framework of Model Law countries;

ix) assist in meeting with OBOR disputes in the near future;

8 O. 59 r. 23 of the Rules of Court 2012.

x) be most effective if it is implemented as University cum Court Annexed Arbitration, whereby importantly the court provides its premises and some facilities like what it does in the case of court annexed mediation in Malaysia;

xi) receive greater support from parties to litigation and lawyers if they are allowed to choose a judicial officer to arbitrate their disputes, facilitated by the court including provision of court premises for conduct of the arbitration.

To facilitate initial implementation, the university arbitration must be by referral from courts. The courts should provide premises and facilitate as it does in the case of court annexed mediation. The court annexed university arbitration scheme can be known by the name University cum Court Annexed Arbitration.

It requires political will as well as support from judiciary and other stakeholders to develop a suitable 'University Arbitration' methodology to provide a cost-effective and efficient dispute resolution mechanism which will truly benefit the ordinary man on the street, whilst creating economic advantage for universities and their faculty members. It may also stand as a near substitute to legal aid schemes, like those in the UK. It will also raise awareness among students about the benefits of ADR at an early stage, thereby arresting a litigious society. The concept if adopted by UNCITRAL will be a boon to the administration of justice and is likely to eradicate the ills related to a backlog of cases in courts.

Justice Datuk Dr. Haji Hamid Sultan bin Abu Backer
Court of Appeal, Malaysia.

18 April 2018

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UNIVERSITY CUM COURT ANNEXED ARBITRATION:

Model Rules for Malaysia 2018*

by

Justice Datuk Dr. Haji Hamid Sultan Bin Abu Backer
Judge, Court of Appeal Malaysia

Dato' Sri Dr. Ashgar Ali, Dean of Ahmad Ibrahim Kulliyyah of Laws,
International Islamic University Malaysia

Arun Kasi,
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PREAMBLE

A. The Court Annexed University Arbitration Scheme, is to facilitate post-litigation reference of disputes present before the court to arbitration by university arbitrators.

B. The arbitration agreement here, called submission agreement, is a post-dispute arbitration agreement as opposed to conventional pre-dispute arbitration agreement.

C. The arbitration hereunder is conducted under the supervision of the CIArb.

D. The two essential features of the arbitration under these Rules are that the arbitration reference is made by the court and the arbitration is conducted by university arbitrators.

E. The university arbitrators will be trained and certified by CiArb - Malaysian branch, the Honourable Society of Lincoln's Inn Alumni Association-Malaysia ("Lincoln Alumni") and Inns of Court Malaysia ("ICM"). Alternatively, they may be suitably qualified persons.

* Approved by eight public universities offering law in Malaysia and CIArb, London (Malaysia Branch).

F. The two common setbacks that hold disputants from going to arbitration are high cost and long delay involved in arbitration. These rules make provision for a cost and time effective arbitration that will overcome both the common setbacks.

G. These Rules ensure that the arbitration conducted under these Rules overcomes both the setbacks.

H. This arbitration is time effective because the entire arbitration has to be completed within 6 months from the date of the submission agreement, failing which the arbitrator will not be entitled to his remuneration. To achieve this end, sanctions by cost is automatically imposed on any party seeing adjournment or extension of time.

I. This arbitration is cost effective, both in party to party cost and in the arbitration cost. Party to party cost is capped at half the scale fee in the Rules of Court 2012, with provision that parties may agree in advance on no-cost. The arbitrator's remuneration is at the rate of RM500 per sitting-day for claims below RM1 million, with provision that the minimum number of claimable days is 5 and the maximum number is 10. The basic remuneration is multiplied by brackets of RM1 million if the claim is above RM1 million.

J. Added to the above is the provision that the arbitrator's remuneration is waived for the first 1 year.

K. The arbitrator's will be appointed in the priority of current faculty members, visiting faculty members, retired faculty members, alumnus of the participating universities with at least 10 years standing in his professional career.

L. It is quality effective inter alia because the awards drafted by the university arbitrators are in effect vetted through by the CIArb - Malaysian branch.

M. These Rules are also first of its kind for introducing an internal disciplinary mechanism in the event of inappropriate conduct by the arbitration.

N. All payments will be made through CiArb - Malaysian branch.

O. The objective is to tap the talents available in universities into dispute resolution at an economical cost, and thereby also relieve the courts of their workload and save public money. The intended result is an new system of arbitration that is an effective, economical and expeditious alternative to litigation.

P. The arbitration will be heard as amiable compositeur unless otherwise agreed.

Q. All arbitral award will be available for publication in CIArb's website, hence no confidentiality.

PART I : COURT ANNEXED UNIVERSITY ARBITRATION RULES

DEFINITION

1. The supervising institution shall be International Group of Arbitrators Berhad (trading as the Chartered Institute of Arbitrators Malaysia Branch) ("CIArb").

REFERENCE

2. Where the litigants in a court proceedings, with the consent of the court, have agreed in writing that the dispute between them shall be referred to and finally determined by arbitration under the Court Annexed University Arbitration Rules (the "submission agreement"), the dispute shall be referred to and finally determined by arbitration in accordance with these Rules.

3. Upon making such reference, the court shall strike out the action before it.

4. It shall be deemed that the arbitral proceedings commenced on the date of the submission agreement, and no party shall raise any defence of time limitation that was not available to that party on the date the originating process was issued.

5. Upon the parties entering into the submission agreement:

(a) the court shall fix a preliminary case management date for the parties and the arbitrator to meet in the court premises within 2 weeks from the date of the submission agreement, and inform the parties and the supervising institution of the same together with the name of any arbitrator agreed on by the parties with consent of the arbitrator;

(b) unless the parties have already agreed on the name of the arbitrator with consent of the arbitrator:

  i) the court shall request, by email, the supervising institution to appoint, within 5 working days, an arbitrator from the approved panel of university arbitrators; and

  ii) the supervising institution shall, thereupon, appoint the arbitrator within the above prescribed time limit from the panel of certified 'university arbitrators', and may for this purpose consult with the participating university to which the arbitrator is associated with;

(c) The supervising institution shall notify the parties, by email, of the appointment of arbitrator with with his email id;

(d) the arbitrator and the parties shall meet as appointed;

e) the Chief Registrar of the Federal Court shall do all that is necessary to facilitate the above.

DIRECTIONS

6. At least 2 working days before the date fixed for the first preliminary case management meeting, the parties shall furnish, by email, the arbitrator with a copy of all pleadings and relevant documents already filed before the court.

7. At the first preliminary case management meeting, if the arbitrator so requests, the parties shall furnish the arbitrator with a hard copy of the above said documents.

8. At the said meeting, the arbitrator shall, upon hearing the parties, give his directions as to how the arbitral proceedings shall progress, including but not limited to:

(a) whether the pleadings and/or any other documents already filed before the court will be adopted for purposes of the arbitral proceedings or the parties shall submit a new set arbitration-pleadings comprising statement of case, statement of defence and counterclaim (if any), statement of reply and defence to counterclaim (if any), supported with relevant documents and with references made in the said arbitration-pleadings;

(b) any other and further documents to be submitted by the parties, including but not limited to, any further arbitration-pleadings, further common bundle of documents, common statement of issues, common statement of agreed facts, list of witnesses of each party, witness statements of each party, and proposed opening speech of each party setting out the facts in brief and the relevant law relied on by that party;

(c) whether evidence shall be tendered by document-only mode or by mode of hearing witnesses or a combination of both modes;

(d) any matters relating to discovery of documents;

(e) dealing with expert evidence;

(f) language of arbitration;

(g) limiting the number of witnesses and and the length of time for hearing of witnesses;

(h) dealing with matters related to costs, arbitrator's remuneration and expenses, administrative fee involved in the arbitral proceedings;

(i) dealing with appointing any person to provide secretarial assistance to the arbitrator, which appointment may only be made with consent of parties;

(j) representation of parties in the arbitral proceedings, including any participating university providing

representation by faculty members and/or students limited to assisting in drafting any document;

(k) finding out the parties if they want to pre-agree on costs of the proceedings, including an agreement of 'no-costs';

(l) fixing venue for the proceedings;

(m) dealing with matters of compensation for loss of use of money in cases of disputes arising from Islamic finance facilities; and

(n) setting a timetable for the entire proceedings, including fixing time limit for each procedure within the arbitral proceedings.

9. Where tendering of evidence has not been directed to be by document-only mode, the arbitrator may direct or allow any party to tender evidence by documents, supported by a statutory declaration, provided that the other party shall be allowed to cross-examine the deponent if he so desires.

10. The arbitrator shall be at liberty to be guided by Order 34 of the Rules of Court 2012 in giving his directions to the parties as to how the arbitral proceedings shall progress.

11. The arbitrator shall be at liberty, upon hearing the parties, to vary his directions at any time, whether on his own motion or request of any party, as the justice of the case may require.

12. It shall be deemed the arbitrator's directions are accepted by the parties.

13. In giving and varying any direction and in dealing with any procedural matter, the arbitrator shall have regard to the justice of the case.

14. Subject to these Rules, the arbitrator shall have all powers permitted by law to ensure the just, expeditious, economical and final determination of the dispute, including the power to abridge or extend time periods prescribed by these Rules or direvenucted by him. In this regard, the arbitrator shall conduct the arbitration in such manner as he considers appropriate, save that at all times the arbitrator shall ensure that the parties are treated equally and are given reasonable opportunity to present their case.

15. The arbitrator shall be at liberty to adopt both adversarial and inquisitorial approach in conducting the arbitral proceedings to attain substantive justice.

16. The arbitrator shall allow amendment to arbitration-pleadings at any time subject to order as to costs or any other terms, provided that the proposed amendment does not substantively alter the character of the case and any prejudice suffered by the other party can be sufficiently compensated or dealt with by an order as to costs or such other terms. In the event that an amendment is allowed after the hearing of witnesses or otherwise receiving all evidence, then the arbitrator shall allow the parties to

tender further evidence by recalling any witness or otherwise.

17. The parties may apply for, and the arbitrator may make, any interim award as the justice of the case requires.

ARBITRATION-PLEADINGS

18. Without limiting its comprehensive nature, the Statement of Case shall contain the following information: -

(a) A statement of the facts and particulars supporting the plaintiff's position in their claim;

(b) Copies of all documents relied upon;

(c) The contentions of fact and law supporting the plaintiff's position;

d)All items of relief and remedy sought by the plaintiff; and

(e) All quantifiable items of claim with accompanying calculations and breakdown (where applicable).

19. Without limiting its comprehensive nature, the Statement of Defence (and Counterclaim, if any) shall contain the following information: -

(f) A confirmation or denial of the plaintiff's claim;

(g) A statement of the facts and particulars supporting the defendant's position in defending the claim;

(h) Copies of all documents relied upon;

(i) The contentions of fact and law supporting the defendant's position; and

(j) Where a counterclaim is advanced, the same kind of information that a claimant is obliged to give in his Statement of Case.

20. Without limiting its comprehensive nature, the Statement of Reply (and Defence to Counterclaim, if applicable) shall contain the following information:

(a) A confirmation or denial of the defendant's defence;

(b) A statement of the facts and particulars supporting the plaintiff's position in replying to the defence;

(c) Copies of all documents relied upon;

(d) The contentions of fact and law supporting the plaintiff's position; and

(e) Where a defence to counterclaim is advanced by the plaintiff, the same kind of information that a Respondent is obliged to give in his Statement of Defence.

21. For purposes of the counterclaim, if any, the defendant shall be treated as the plaintiff and the plaintiff shall be treated as the defendant.

22. In the event that no reply to the defence is submitted, joinder of issues shall apply.

STATUTORY AND PROCEDURAL MATTERS

23. These rules shall be subject to Arbitration Act 2005.

24. The venue of arbitration shall be in the place of the court premises from which the reference was made or such other place as the parties and arbitrator may agree.

25. The arbitration conducted under these Rules shall be conducted by a sole arbitrator, unless otherwise agreed by the parties in the submission agreement, in which event all references herein to "arbitrator" shall mean the arbitral tribunal comprising the number of arbitrators as agreed.

26. The reference to these Rules in the submission agreement shall be deemed to refer to the current version of these Rules at the time of proceedings before the arbitrator, subject to any modification that the parties have agreed to in the submission agreement.

27. Parties and the arbitrator shall serve all notices, statements, submission or other documents under these Rules by e-mail, provided that the arbitrator shall be at liberty to additionally direct the parties to tender a hard-copy of any document served by e-mail for convenience of reference. It shall be deemed that a service has duly been made at the time when the e-mail was successful sent out. Any communication made by the arbitrator to any party shall be copied to the other party or parties. Similarly any communication by any party to the arbitrator shall be copied to the other party or parties.

28. For the purposes of calculating a period of time prescribed by these Rules, the period shall begin to run on the day following the day when a notice, statement, submission or other document is served or when the act prescribed takes place. If the last day of the period is a weekend holiday or public holiday, the period is extended until the first day that is not a weekend holiday or public holiday. Weekend holiday or public holidays occurring during the running of the period of time are included in calculating the period. Any document due to be served by a particular date, shall be served at or before 4.00 p.m. on that day.

29. Where there is a conflict between Part I and Part II of these Rules, the provisions in Part I shall prevail.

REMUNERATION AND FEE

30. The remuneration and expenses of the arbitrator shall be as prescribed by these Rules, applicable on the date of the submission agreement.

31. The administrative fee payable to the supervising institution, the participating university and court shall be as currently prescribed in these Rules at the time of payment thereof.

32. The plaintiff shall ensure that the remuneration due to the arbitrator and the administrative fees referred to

in the preceding paragraph have been deposited in full to the supervising institution before the first preliminary case management meeting and produce a copy of the receipts therefor to the arbitrator at the said meeting.

DEFAULTS

33. If any party defaults in complying with these Rules or the directions made by the arbitrator, he may proceed with the arbitration in the manner he considers fit and make an award, including an award by default.

34. In so proceeding with the arbitration, the arbitrator shall have regard to the justice of the case.

35. In the event that the arbitrator makes an award by default, any party may apply to the arbitrator to set it aside within 14 days of receipt of the said award supported by grounds for setting it aside, which the arbitrator may allow subject to costs and terms as he deems fit. A party making such an application shall have paid all contribution for fees and costs of the arbitration before making the application.

AWARD

36. After receiving all the evidence and hearing the submission of parties, the arbitrator shall draft his award and furnish by email a copy of the same to the supervising institution together with a note in draft of the all remuneration, expenses and fees and costs payable by the parties.

37. The supervising institution, upon receiving the draft of the award, may within 14 days, make any remarks as it deems fit for consideration of the arbitrator, and shall within such time approve the above said note in draft subject to such amendments as it deems fit and pursuant to these Rules.

38. Upon receipt of such remarks, if any, the arbitrator shall make any alternation to the draft as he deems fit, and thereupon inform the parties that the award is ready for collection subject to payment of any outstanding amount of the remuneration, expenses and fees approved by the supervising institution.

39. The arbitrator shall, by email, furnish the supervising institution a final note of remuneration and fee, which the supervising institution shall be at liberty to amend as it deems fit and inform the parties of the final amount of the remuneration, expenses and fee payable by the parties and any balance thereunder.

40. The parties thereafter shall ensure that the said outstanding, if any, is forthwith paid to the supervising institution, whereupon the supervising institution shall issue a payment clearance certificate to the parties with copy to the arbitrator.

41. Upon receipt of the payment clearance certificate, the arbitrator shall forthwith email the final award to the parties with copy to the supervising institution.

42. Upon receipt of the final award, the supervising institution shall publish the same in its website available freely to the public.

COSTS AND INTEREST / COMPENSATION CHARGES

43. The arbitrator may make such award as to interest, both post award and pre-award as compensation for loss of use of funds, as he deems just after hearing the parties on the interest.

44. In making a decision as to interest, the arbitrator shall take into account any agreement of parties as to interest.

45. The remuneration, expenses and costs payable to the supervising institution and for the arbitrator shall in principle be borne by the unsuccessful party or parties. However, the arbitrator may apportion each of such costs between the parties if he determines that apportionment is reasonable, taking into account the circumstances of the case.

46. The arbitrator shall in the final award or, if it deems appropriate, in any other award, have the power to order party-to-party costs as he deems fit, provided that such costs shall not exceed half the amount of the scale cost found in the Rules of Court 2012 except where parties have agreed otherwise. In making an award for the party-to-party costs, the arbitrator shall take into account reasonable costs incurred by the party entitled to costs in relation to stationary items, printing, travel and despatch, witnesses, etc.

47. Any party seeking an adjournment of a date fixed before the arbitrator shall pay a sum of RM500.00 as costs, if the adjournment is allowed by the arbitrator which it shall be at his discretion to allow or reject. Similarly, a party seeking any extension of time fixed by the arbitrator shall pay a sum of RM250 as costs, if the adjournment is allowed by the arbitrator which it shall be at his discretion to allow or reject. The costs reserved herein shall be divided in two equal portions, and one portion one paid to the arbitrator and the other to the other party or parties. The said payments shall be made within 1 working day after being notified of the adjournment or extension having been allowed.

TIME LINE FOR AWARD

48. The receiving or hearing of all submissions shall be completed within 3 months after the date of the submission agreement.

49. The draft of the award required to be furnished to the supervising institution shall be so furnished within 1 month after the date when all the submission have been received or heard.

50. Within 1 month from the date of receipt of the above said draft of the award, the supervising institution shall revert to the arbitrator with its remarks if any.

51. Within 14 days after expiry of the above said period for the supervising institution to revert with its remarks, if any, the arbitrator shall make the final award, taking into consideration any remark made by the supervising institution, and inform the parties of its readiness for collection.

52. The time lines fixed above may be extended with consent of the parties.

53. In the absence of such consent, if the arbitrator fails to meet the time lines above, he shall not be entitled to any remuneration under these Rules and the supervising institution may appoint any other university arbitrator as arbitrator to take over the conduct of the proceedings.

54. In the event of supervening inability of the arbitrator to continue with the proceedings, the supervising institution shall appoint another university arbitrator to continue the proceedings as part-heard matter but not de novo. Upon making such an appointment, the supervising institution shall determine the portion of the fee to be paid to the previous arbitrator and to the newly appointed arbitrator.

AMIABLE COMPOSITEUR AND TRADE CUSTOM

55. The arbitrator shall decide as amiable compositeur or *ex aequo et bono*, unless otherwise agreed by the parties in the submission agreement or in the first preliminary case management meeting.

56. In all cases, the arbitrator shall decide in accordance with the terms of the submission agreement and shall take into account any usage of trade applicable to the transaction.

ISLAMIC FINANCE

57. In the case of a dispute in connection with Islamic Finance Facilities, the arbitrator shall ensure that any decision that he makes does not render unrecoverable any principal facility sum paid by the duly licensed financier to the customer and damages for loss of use of money, the quantum of which the arbitrator shall determine.

EXCLUSION OF LIABILITY

58. Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the supervising institution and any person appointed by the arbitrator based on any act or omission in connection with the arbitration.

59. This shall be without prejudice to the right of the parties to lodge a complaint against the arbitrator, including of any undue delay caused by the arbitrator, to the university for it to internally enquire the complained conduct including holding a disciplinary proceedings and to internally take such measures and sanctions as desirable including suspending or debarring his or her certificate as university arbitrator, provided that the complainant shall

not have any right to participate in the said enquiry or to know any status or result of such enquiry.

MISCELLANEOUS

60. University students, with the approval of the university and consent of the arbitrator, may be allowed to observe the arbitral proceedings.

61. Nothing in these Rules shall prevent the parties to settle their dispute by mediation, conciliation, negotiation or any other means of amicable settlement, before the award is published.

62. All proceedings before the arbitrator under these Rules shall be recorded.

TRAINING AND CERTIFICATION OF UNIVERSITY ARBITRATORS

63. The arbitrator(s) appointed under these Rules or conducting proceedings under these Rules shall be one(s) duly trained and currently certified as 'university arbitrator' by the supervising institution, the Honourable Society of Lincoln's Inn Alumni Association-Malaysia ("Lincoln Alumni") and Inns of Court Malaysia ("ICM").

64. Lincoln Alumni and the ICM may at their discretion as they deem fit permit any fellow or chartered arbitrator of Chartered Institute of Arbitrators to be certified as 'university arbitrator' without being trained pursuant to the preceding paragraph. Similarly, any person holding a qualification, certificate or otherwise related to any other arbitration or law related body may be permitted to be certified as 'university arbitrator' without being trained pursuant to the preceding paragraph.

65. A person may be trained and certified as 'university arbitrator' if he is a faculty member, a retired faculty member, a visiting faculty member or an alumnus of any participating university of at least 10 years standing in the respective professional practice.

PART II : UNCITRAL ARBITRATION RULES (REVISED 2010)

(UNCITRAL Rules will be appended to in this place)

PART III : SCHEDULES

ARBITRATOR'S REMUNERATION

1. The amount or value in dispute shall be classified, for purposes of determining the remuneration of the arbitrator or arbitrators, in brackets of RM1,000,000 (or any part thereof).

2. For example, where the amount in dispute is between RM1 and RM1,000,000, it will fall within bracket 1. Where the amount in dispute is between RM1,000,001 and

RM2,000,000, it will fall within bracket 2, and so forth.

3. Remuneration for amount or value in dispute not exceeding RM1,000,000:

(a) RM500.00 per day of sitting.

(b) The minimum remuneration shall be for 5 days of sitting in the event that the matter is completed with sittings less than the said 5 days.

(c) The maximum remuneration shall be for 10 days of sitting in the event that the matter is completed with sittings more than the said 10 days.

(d) It shall be deemed a day of sitting, if the arbitrator has sat for hearing any matter and has at least partly heard the matter on that day irrespective of the length of time spent on that day. However it shall not be deemed a day of sitting, if the hearing was adjourned without any hearing on that day.

(e) The remuneration payable as computed hereinabove shall be referred to as "the Base Remuneration".

4. For amount or value in dispute exceeding RM1,000,000:

a) Base Remuneration x the Bracket Number.

b) For example, a dispute involving an amount between RM1,000,001 and RM2,000,000 shall attract a remuneration made of the Base Remuneration x 2.

5. The arbitrators will waive the remuneration in the case of arbitrations undertaken within 1 year from the date of launch of this scheme.

6. The above remuneration structure shall apply unless otherwise agreed between the parties and the arbitrator(s) in the first preliminary case management meeting.

7. The CIArb's fee per arbitration shall be RM500. CIArb shall pay the fee due to participating universities from this said RM500. The said fee shall be waived in the case of arbitrations undertaken within 1 year from the date of launch of this scheme.

PART IV : SAMPLE FORMS

SUBMISSION AGREEMENT

(Intitutlement as in Action)
Submission Agreement

The parties hereto hereby agree, with the consent of the court, that the dispute between them which formed the subject of the the litigation between the parties in this action be referred to and finally determined by arbitration under the Court Annexed University Arbitration Rules.

The number of arbitrators shall be _____ (one, if left blank).

The language of arbitration shall be _____ (English, if left blank).

The seat of arbitration shall be in _____ (Peninsular Malaysia, Sabah or Sarawak).

…….
Plaintiff

…….
Defendant

……..
Consented to by Court

PART V : NON-BINDING GUIDELINES

8. All the paragraphs appearing below here are merely for purposes of guidance to the institutions playing a role in administration of arbitration under these Rules. They shall not be binding on the said institutions or any party. No challenge may be taken by any party for non-compliance or infringement of the said guidelines.

9. The role of the supervising institution, in addition to those appearing above, shall include collecting all payments of fees, remuneration, expenses and deposits therefor, and paying the arbitrator the remuneration and expenses due to him and returning any due part of such payment to the parties, and taking any due part thereof as its own administrative fee, pursuant to these Rules.

10. In making the appointment of arbitrator, the supervising institution shall take into account all relevant factors including suitability of the arbitration to hear the matter and to travel between his place of residence or office and the court premises where the arbitral proceedings are to be held.

11. Subject to consideration as to suitability as stated above, the supervising institution shall generally make its appointment in the order of priority as follows: faculty members, retired faculty members, visiting faculty members and alumni of the participating university.

12. The supervising institution shall handle all matters related to accounts, except where it is otherwise stated in the Part I of these Rules.

13. The role of the participating university, in addition to those appearing above, shall include providing sourcing suitable candidates from the faculty members and other associated with the university to be trained and certified as 'university arbitrator' and to coordinate with the supervising institution upon its request for appointment of arbitrator for any case.

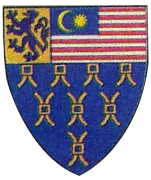
14. The role of the Chief Registrar of the Federal Court, in addition to those appearing above, shall include that facilities and court premises are made available for the arbitration and to facilitate making of any practice direction necessary for purpose of attaining effective arbitration hereunder.

15. The roles of the ICM and of the Lincoln Alumni shall be to facilitate conduct of training and certification of 'university arbitrator'.

16. All the above said bodies shall be at liberty to regulate its own affairs as it deems fit.

PART VI : JUDICIAL OFFICERS AS ARBITRATORS

17. Parties to litigation may be allowed to choose a judicial officer of their common choice as the arbitrator subject to the Chief Justice's approval, which may require some amendment to the Rules of Court or issuance of a Practice Direction for that purpose, in the near future.



The Honorable Society of Lincoln's Inn
Alumni Association, Malaysia

UNIVERSITY CUM COURT ANNEXED ARBITRATION

Proposal and Model Scheme Book for Malaysia 2018