



Working Paper Series No. 009

**Evolution of Arbitration as A Legal Institutional
And The Inherent Powers of the Court :**
Putrajaya Holdings Sdn. Bhd. v. Digital Green Sdn. Bhd.

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ASLI Visiting Fellow
(25 October to 21 November 2009)

February 2010

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**EVOLUTION OF ARBITRATION AS A LEGAL INSTITUTIONAL
AND THE INHERENT POWERS OF THE COURT :
PUTRAJAYA HOLDINGS SDN. BHD. V. DIGITAL GREEN SDN. BHD.¹**

GRACE XAVIER*

I. INTRODUCTION

The supervisory jurisdiction that the High Court exercises over the way in which inferior courts and tribunals conduct their proceedings on which Lord Denning MR and Cumming-Bruce LJ relied as one source of its jurisdiction to prohibit further proceedings in an arbitration is not inherent in its character as court of justice; it is statutory.²

As explicitly stated in the above quotation, court intervention in arbitration proceedings is not inherent, it is statutory. The ominous question that confronts us is: how much interference is available within the discretion of the court? Too much may hamper the development of arbitration and hinder its establishment as a legal institution. Too little may mean that there is a probability that the principles of natural justice may be infringed and the parties may be disadvantaged without recourse to further avenues of justice.³

II. HISTORY

According to biblical theory, King Solomon was the first arbitrator when he settled the issue of who was the true mother of a baby boy. In the story,⁴ two mothers were making claims to one baby. Two of them had delivered baby boys. One of the babies died in the night and the mother whose baby had died was now claiming the surviving child as hers. King Solomon proposed that since neither was willing to relinquish their claim, it would be best to cut the baby into two and hand one-half to each of them.⁵ The true mother

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¹ [2008] 7 M.L.J. 757 [“Putrajaya Holdings”].

² *Bremer Vulkan v. South India Shipping Corp.*, [1981] 1 All E.R. 289 at 295-96, aff’g [1981] A.C. 909. The House of Lords in this case upheld the decision of the Court of Appeal that an arbitrator did not have powers similar to those of a court to dismiss a claim for want of prosecution. While this aspect of the decision was not controversial, their Lordships went on to hold by a majority of 3:2 that the court had no power to intervene to restrain a dilatory claimant from proceeding with arbitration even where the delay was such that a fair hearing was no longer possible. The decision was important, as it revealed that the U.K. courts at that time favoured non-intervention, even when it was possible that an injustice might result. Lord Diplock explained the decision on the basis that there was a real difference between litigation and arbitration, in that litigation was adversarial while arbitration was consensual. Where both parties were at fault for the delay, the courts would not intervene at the request of a party which sought to extricate itself from a difficult situation to which it had contributed. Lord Diplock continued (at p. 985): “... the parties make the arbitrator the master of the procedure to be followed in the arbitration. Apart from a few statutory requirements under the *Arbitration Act 1950*... he has a complete discretion to determine how the arbitration is to be conducted from the time of his appointment to the time of his Award, so long as the procedure he adopts does not offend the rules of natural justice.”

³ *Supra* note 1.

⁴ *The King James Bible* 1 Kings 3:16-28.

⁵ Nevertheless, this proposition would never have been carried out by King Solomon. The term “Judgment of Solomon” was coined from this early biblical story, and is now used to refer to wise judges who use a

immediately protested, and said that she would rather give up her baby to the other woman rather than to see her baby killed. Solomon declared that the woman who had shown the compassion was the true mother and returned her baby to her. Thus he managed to find out the truth. Philip the Second, the father of Alexander the Great, used arbitration as a means to settle territorial disputes arriving from a peace treaty he had negotiated with the southern states of Greece as far back as 337 B.C.⁶

In later times, arbitration owed its beginnings to commercial disputes as it started with trade disputes being resolved by peers as early as the Babylonian days.⁷ The Sumerian Code of Hammurabi⁸ (c. 2100 BC) was promulgated in Babylon, and under the Code it was the duty of the sovereign to administer justice through arbitration.⁹ The Greeks were subsequently influenced by their Egyptian ancestry and continued the use of arbitration. This then moved along with the times into the Roman civilization and was slowly influenced by Roman laws. Such was the move not just within the Roman Empire but also over the countries with which Rome traded.¹⁰

In England, arbitration began even before the King's courts were established.¹¹ According to Massey,¹² England used arbitration as a common means of commercial dispute resolution as far back as 1224. It developed as a means for merchants and traders to avoid the courts.¹³ The earliest recorded evidence relating to a written law of arbitration in England dates back to 1698.¹⁴ Eastwards, in India, arbitration was conceived in the system called the Panchayat. Indian civilization was an express proponent of encouraging settlement of differences by tribunals chosen by the parties themselves.¹⁵ Usually the tribunals were constituted of wise men in the community. Arbitration in India then continued its development with the first Bengal Regulations, enacted in 1772 during the British rule, followed by more specific legislation, the *Indian Arbitration Act 1940*, which was later modernized by the *Arbitration and Conciliation Act 1996*.¹⁶ And in Bangladesh,

strategy to trick parties into discovering the truth of the matter. "Judgment of Solomon", online: Wikipedia, The Free Encyclopedia. <http://en.wikipedia.org/wiki/Judgment_of_Solomon>.

⁶*Supra* note 1.

⁷"The History of Arbitration", online: Australian Arbitration <<http://www.australianarbitration.com/history-arbitration>>.

⁸The Code of Hammurabi is the longest surviving text from the Old Babylonian period. It is far more significant in legal history than any of its forerunners, such as Ur-Nammu. Made up of 282 laws, carved in forty-nine columns on a basalt stele, the Code addresses a variety of issues arising out of civil, criminal and commercial matters. Hammurabi describes the code as "laws of Justice" intended to clarify the rights of any "oppressed man": Steven Kriss, "The Code of Hammurabi" (3 August 2009), online: The History Guide <<http://www.historyguide.org/ancient/hammurabi.html>>.

⁹Douglas M. Johnston, *The Historical Foundations of World Order: The Tower and The Arena*, (The Netherlands: Martinus Nijhoff Publications, 2008) at 195.

¹⁰*Ibid.*

¹¹William Herbert Page, *The Law of Contract*, vol. 4, (The W.H. Anderson Company, 1919) c. 75 at 2526ff.

¹²Robert V. Massey Jr., "History of Arbitration and Grievance Arbitration in the United States," online: Arbitration History <http://www.wvu.edu/~exten/depts/ilsr/arbitration_history.pdf>.

¹³Daniel Atkinson, "Arbitration or Adjudication," (31 August 2001), online: Atkinson Law <http://www.atkinson-law.com/DisputeResolution/Arbitration/Arbitration_Article_002.htm>.

¹⁴Julian D. M. Lew, Loukas A. Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration*, (Kluwer Law International, 2003) at 19.

¹⁵"Kinds of Arbitration", online: Disputes Settlements Trust <http://www.dst.org.in/kinds_of_arbitration.htm>.

¹⁶No 26 of 1996 ["1996 Act"]. See Krishna Sarma, Momota Oinam & Angshuman Kaushik, "Development and Practice of Arbitration in India – Has it Evolved as an Effective Legal Institution" (October 2009) CDDRL Working Papers, Number 103. Prior to the enactment of the *1996 Act*, there were three main

a traditional dispute resolution mechanism known as the *shalish* is common. Disputes that are normally resolved by *shalish* are those involving marital disputes, desertion, divorce, child custody, maintenance and land issues.¹⁷ The list goes on, but for the purposes of this article, these examples will suffice.

III. THE MALAYSIAN ARBITRATION ACT 2005

Arbitration in Malaysia has been governed by statute since the *Arbitration Act* of 1952.¹⁸ In 2005, Parliament passed the new *Arbitration Act*.¹⁹ Although the *1952 Act* did not make a distinction between international and domestic arbitrations, the *2005 Act* has made that distinction. While the *2005 Act* applies to both international and domestic arbitrations, there are particular provisions that may apply only if the parties provide for the application of those provisions. In domestic arbitrations, Part III of the Act shall apply unless the parties agree otherwise in writing (i.e. parties will be governed by sections 40-46 unless they expressly provide that they will not be governed by Part III). In international arbitrations, where the seat of arbitration is in Malaysia, then Part III shall not apply unless the parties agree otherwise in writing.

The *2005 Act* came into force in March 2006, and since that date proceedings have been conducted under the provisions of the later Act. What is interesting is that despite the clear provision in the *2005 Act* that the Act shall apply to all arbitrations commenced after the coming into operation of the Act, the court in *Putrajaya Holdings* decided that parties may choose whether to be governed by the previous enactment or the prevailing enactment.²⁰ This is, in my opinion, a classic example of the reluctance of the courts to let go of the opportunity to intervene in arbitration proceedings.

In *Putrajaya Holdings*, the defendant had carried out some works for the plaintiff company, and since the plaintiff owed a debt to the defendant, the defendant commenced winding-up proceedings against the plaintiff, to which the plaintiff objected. The defendant then filed a defence and counterclaim. There was an arbitration clause in the agreement. The plaintiff sought to stay the court proceedings, as it wanted the parties to proceed to arbitration – and since the arbitration was commenced in 2007, it naturally assumed that the *2005 Act* would be the governing law. The defendant contended that the matter should be governed by the *1952 Act*. The issue before the court was which statute was applicable.

The salient issues to be considered were as follows: If the *2005 Act* were to apply – as in my opinion should have been the case, since the statutory wording is clear – then the defendant would not have been able to proceed with his court proceedings, and the matter would have had to have gone to arbitration. There is no provision under the *2005 Act* for the court to set aside the proceedings, or to revoke the power of the arbitrator as provided for in section 25 of the *1952 Act*. Under the *2005 Act*, the court may only stay proceedings if there is no arbitration agreement, or if there is no dispute that can be arbitrated. That the

statutes governing arbitration in India. These were the *Arbitration (Protocol and Convention) Act 1937*, the *1940 Act*, and the *Foreign Awards (Recognition and Enforcement) Act 1961*. All these acts are now repealed with the coming into force of the *1996 Act*.

¹⁷ “Bangladesh, Gender and Social Justice”, online: Asian Development Bank <<http://www.adb.org/gender/practices/governance/ban002.asp>>.

¹⁸ Act 93 [“*1952 Act*”].

¹⁹ D.R.30/2005 [“*2005 Act*”].

²⁰ *Supra* note 1.

court was not happy with the fact that section 25 had been removed from the *2005 Act* was obvious from the observation of the learned judge, Ramly J:²¹

The changes in the new *2005 Act* is very substantial as it oust [sic] the court's jurisdiction to interfere when the parties agree in writing to refer the dispute to arbitration and there is no similar provision to s 25(2) of the *1952 Act* in the new *2005 Act*. The defendant shall have not entered into the arbitration agreement with the plaintiff if the defendant were aware that it cannot refer the dispute to the court as provided under s 25(2) of the *1952 Act*.

Although this reasoning seems inconsistent with the provisions of the *2005 Act*, it must be conceded that there was a glaring discrepancy between the *Bahasa Malaysia* version of the *2005 Act* and the English version. In Clause 51(2) of the *2005 Act* passed by Parliament, the clause read:

Jika perjanjian timbangtara dibuat atau prosiding timbangtara dimulakan sebelum permulaan kuat kuasa Akta ini, undang-undang yang mengawal perjanjian timbangtara dan prosiding timbangtara itu adalah undang-undang yang sepatutnya terpakai seolah-oleh [sic] Akta ini tidak diperbuat.

Translation:

Where the arbitration agreement was made or the arbitral proceedings were commenced before the coming into operation of this Act the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this Act has not been enacted.

The *Bahasa Malaysia* version of the *2005 Act*, which received the Royal Assent, had exactly the same wording as the Bill. However, the English translation of the *2005 Act* omitted the part relating to the making of the agreement, and read as follows:

Where the arbitral proceedings were commenced before the coming into operation of this Act, the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this act had not been enacted.

It is thus unfortunate that the parties in *Putrajaya Holdings* bore the brunt of a blunder by the draftsman, whose oversight (together with that of the many others who worked on the draft bill) caused the discrepancy between *Bahasa Malaysia* and English versions. As a result of this oversight, the parties incurred additional expense to determine the circumstances in which a court may interfere in proceedings which are subject to an arbitration clause.

Interestingly, in *Putrajaya Holdings* neither the parties' lawyers nor the court noted that a government circular²² had declared the English text of the Act to be the authoritative one.

²¹ *Ibid.* at 770.

²² P.U.(B) 61/2006.

What is the significance of this decision? It appears to be a simple case of statutory interpretation. However, the implications of the decision are far-reaching. It may even encourage parties to make arbitration agreements but then to argue that their intention was to be governed by the *1952 Act*. Can this be allowed? Can reference be made to a repealed enactment? Although the court in *Putrajaya Holdings* might well have been influenced by the a clear disparity between the English version of the *2005 Act* and the *Bahasa Malaysia* version, the question remains – why did no one refer to the fact that the English text of the Act was supposed to be the authoritative version?

IV. CONCLUSION

The propensity of the courts to intervene may be more detrimental than beneficial to the parties to arbitration, as well as to arbitration as a dispute resolution mechanism, as it may appear that the arbitrator or arbitral tribunal is not effective in resolving disputes. Too much intervention in arbitration proceedings may result in obliterating the concept of access to justice for all, as not all persons wish to bring their disputes to the courts, and commercial entities frequently shun the courts for fear of adverse publicity. Arbitration is a consensual mode of dispute resolution; parties agree that the dispute that has arisen between them shall be resolved by someone who understands the complications and intricacies involved in their particular trade or business. In order to maintain the present popularity of arbitration as a commercial dispute resolution mechanism, party autonomy must be preserved and enhanced, wherever possible, without offending the dictates of justice, fairness and public policy. This objective has been achieved by the U.K. *Arbitration Act 1996*.²³ The *U.K. Act* was influenced by the provisions of UNCITRAL's *Model Law*²⁴ of 1985, which favoured the principle of party autonomy, while minimising court control in order to maintain the effectiveness of arbitration as a much sought-after and much desired commercial dispute resolution mechanism.

²³ c. 23 [“*U.K. Act*”].

²⁴ *Model Law on International Commercial Arbitration*, GA Res. 40/72, UNCITRAL, 1985.