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THE FUNDAMENTALITY OF DUE DILIGENCE IN CHOOSING ARBITRAL INSTITUTIONS

INTRODUCTION

This paper attempts to discuss the arbitral institutions that the considerations parties and counsel must contemplate in selecting an arbitral institution, which is a crucial process and can indicate from the on-set, the seat of arbitration which is primary in initiating, deliberating and enforcing an arbitral award.

This discourse provides a comparative analysis of some top global arbitration institutions and the advantages or challenges arbitration institution users must reflect on in choosing an institution, as well as providing a further insight into the growing trend in switching between Arbitration and Mediation and its efficacy in resolving international disputes with a particular focus on the emerging areas in Africa, particularly Nigeria.



ARBITRATION AGREEMENT VIS-À-VIS ARBITRATION CLAUSES

Most arbitration agreements are entered into as exit strategies; they are inserted into agreements without much thought as to the dynamics of the arbitration proceedings in the event the contractual relationship actually goes wrong.

No partner wants to be the one proffering detailed solutions as to how their marriage should be dissolved if it gets to that, but as much as we all want a happy ending, some marriages must dissolve. Thus, when things go wrong, parties have to ensure that their arbitration agreements fulfil their expectations of an easy way out; the best 'exit strategy'.

Practice has shown that parties enter into arbitration agreements either in compliance with global standards and trend or with limited background information. This presentation focuses on guiding individual and businesses in choosing the 'right' arbitration institution when drafting arbitration agreements.

The foremost choice to make in drafting arbitration agreements is to decide on what form the terms should take, as an ad-hoc arbitration or institutional arbitration.

An ad hoc arbitration clause, requires a less formal structure. Hence, it may be preferable for parties to create a detailed structure for the arbitration in the agreement, or else agree to the application of non-administered arbitration rules like that of the United Nations Commission on International Trade Law (UNCITRAL).

In institutional arbitration, the task of agreeing to relevant procedures can be fairly easy, as all institutions have their set of rules governing the conduct of the arbitration process if there is no contrary agreement between the parties.

A survey of international arbitration users in 2015 found that 79% of the arbitrations they were involved in over the previous five years (2010-2015) were institutional arbitrations (2015 International Arbitration Survey: Improvements and Innovations in International Arbitration by the School of International Arbitration at Queen Mary University

of London. The survey is available on the QMUL's website).

There are several reasons for this preference for institutional arbitration. An institution can lend political or moral weight to awards. More practically, because institutional rules are designed to regulate the proceedings comprehensively from beginning to end, the institutions are better suited to cater for contingencies that might arise, even if (as sometimes happens) a party fails or refuses to cooperate. By incorporating an institution's rules into the contract, contracting parties also avoid the time and expense of drafting a suitable ad hoc clause.

As noted above, the institution will also assume administrative responsibility for the arbitration, and take care of fundamental aspects of the arbitration procedure. The fees and expenses of the arbitration are, with varying degrees of certainty, regulated, and some arbitral institutions independently vet awards to ensure enforceability.

WHY CHOOSE AN ARBITRATION INSTITUTION?

Arbitration institutions have their distinct features in terms of their modus and form. Some of these features are determined by the institutions based on their peculiar services, like the expensive commencement fee of the International Centre for Settlement of Investment Dispute, while others are not so much in control of the institutions, like territorial locations.

The London Court of International Arbitration (LCIA) for example, is expectedly situate in London. Therefore, just like determining what size of shoes to buy according to the size of one's foot, so is choosing an arbitration institution according to the peculiarity of the nature of business or relationship entered into.

It is imperative that parties decide what arbitration institution with a profound knowledge of the various systems and mechanisms of the institution and how they best fit in with their business.

There are many institutions to choose from. As a general rule, newly formed institutions or institutions without a proven track record should be avoided.

That aside, there is no magic formula for choosing between them. Increasingly, institutions and institutional rules are offering similar processes with little to distinguish them. An example is the widespread introduction of mechanisms such as emergency arbitration, once a key distinguishing feature of only certain leading institutions. Such similarity leads parties to look to more subjective factors in deciding which institution to use: familiarity with the institution, their opinion of the international acceptability or reputation of a given institution, the proactiveness and responsiveness of the institution's staff, and the institution's neutrality or "internationalism".

It is important to recognise that institutional arbitration rules provide only a framework for the procedure of the arbitration. The way in which the arbitration is conducted will be determined by the specific approach of the arbitrators. Factors such as their degree of experience in international arbitration, legal background and training, and views on the legal issues for determination in the arbitration will influence their approach. It is therefore essential to consider carefully the approach you want the tribunal to take when selecting your arbitrator.

In choosing an arbitration Institution, certain criteria have to be taken into consideration. Some of the major ones include:

- (i) The seat of the arbitration;
- (ii) The level of involvement of the arbitration Institution;
- (iii) Privacy;
- (iv) Fast track arbitration and early determination;
- (v) The relative abilities and expertise of the institutions with respect to types of subject-matters;
- (vi) The relative experience and ability of the institutions' administrators or secretariats respecting case administration;
- (vii) Relative reputation insofar as reputation may enhance or undermine the prospects for enforcement of an arbitral award;
- (viii) Cost, both administrative and arbitrator fees; and

- (ix) Whether certain institutions are better suited for arbitration in certain locations.

The Seat of Arbitration

The 'seat' of arbitration, although abstract in form, is a subject of a legal conflict. Simply, the 'seat' of arbitration is the legal domicile or home of international arbitration. It provides for the nation's Arbitration Law that would govern the arbitration.

On the other hand, the 'venue' or 'place' of arbitration refers to the specific geographical location for the purpose of the arbitration proceedings. The principles that guide courts to resolve the disputes of seats are the provisions of the arbitration clause.

Generally, seats imply the laws of the arbitration that would guide the arbitration procedure while the venue determines the physical location of the arbitration. The Arbitration law of Nigeria (The Arbitration and Conciliation Act of 2004) does not expressly provide for the seat or venue of arbitration, however the court in **NNPC v Lutin Inv Ltd (2006) 2 NWLR (pt. 965) 506** interpreted the usage of 'place' to also mean 'venue'.

In a proceeding to enforce the award of USD6.6 billion arbitration award against Nigeria, Nigeria argued that the arbitration was supposed to be seated in Nigeria and not England and therefore the award should not stand. The court held that reference to 'venue' in an arbitration agreement referred to the legal seat. The agreement in this matter was actually couched to allow the Arbitration and Conciliation Act of 2004 (ACA) to be applicable, but it went ahead and provided that the venue of the Arbitration should be London, England or as parties agree. Although Nigeria successfully overturned the award, it was not based on the 'seat' argument, but on public policy grounds. The court found that since the proceeding took place in London, Nigerian courts cannot set aside the award. The court's decision was based on the following reasons:

- The clause referred to venue "of the arbitration", implying that it would apply to the whole proceedings. This was compared

with the language used in the Nigerian ACA to refer to the physical location, for example where a tribunal may “meet” or “hear witnesses, experts or the parties”.

- The clause stated that the venue of the arbitration “shall be” London. If the reference to “venue” was to where the hearings would take place, it would be inconvenient for this to be in London given the location of the parties. The court reasoned that this was not something that the parties were likely to have intended. In addition, the arbitration agreement allowed the “venue” to be changed only by the parties, not the tribunal. The selection of the hearing venue is typically decided by the arbitrators, further indicating that the parties intended to refer to the legal seat.
- Reference to the rules of the Nigerian ACA was not inconsistent with the choice of England as the seat. Any non-mandatory provisions of the Arbitration Act 1996 were displaced and only the mandatory provisions would continue to apply.

The seat is a key factor in any arbitration. It provides a “home” for the arbitration, determines the law governing the relationship between the tribunal and the courts, and also determines which court has supervisory jurisdiction over the arbitration (giving them the power to, among other things, set aside an award). The seat will also determine where the award has been made, which is significant when trying to enforce the award.

The physical location of an arbitration does not have the same legal significance. Generally speaking, the location is decided based on convenience of all involved. It does not need to be (and frequently isn't) the same as the legal seat of the arbitration.

It is important for parties to designate the legal seat of an arbitration in their arbitration agreement. This case underlines the benefits of using clear terms when referring to the intended seat in an arbitration agreement to ensure that the legal seat is where the parties intended and to avoid unnecessary procedural disputes.

Level of Institutional Involvement

Arbitral institutions have varying levels of involvement in managing and administering arbitrations. Institutions such as the Hong Kong International Arbitration Centre (HKIAC), for example, promote their “light touch” approach with rules emphasising party autonomy and entrusting the arbitrators with the primary decision-making power. Other institutions, such as the International Court of Arbitration of the International Chamber of Commerce (ICC), are known for more intensive involvement in arbitrations. One practical example of these contrasting approaches is in respect of scrutiny of arbitral awards. Institutions like the ICC and the Singapore International Arbitration Centre (SIAC) engage in a mandatory scrutiny and approval of draft awards of the tribunal. The ICC Court performs the scrutiny process and may lay down modifications as to the form of the award and, without affecting the tribunal's liberty of decision, may also draw the tribunal's attention to points of substance. The idea is to prevent the award suffering from defects in form or substance that could give rise to difficulties at the enforcement stage. Many other institutions, such as the HKIAC, London Court of International Arbitration (LCIA), and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), do not scrutinise or approve awards, leaving it to the tribunal to render a valid award. This difference reflects the varying views about the value of the scrutiny process, some parties consider the additional quality assurance to be a benefit, while others see it as imposing unnecessary delay and expense.

Cost of the Arbitration

There is no straight jacket as to which institution is best, but each institution has its attendant advantage to parties according to the peculiarity of the circumstance of each case. Let us look at the cost variation of five popular Arbitration institutions to help drive this point. The institutions are:

- a. The International Court of Arbitration of the International Chamber of Commerce (ICC)
- b. The London Court of International Arbitration (LCIA)
- c. The Arbitration Institute of the Stockholm Chamber of Commerce (SCC)

- d. The Singapore International Arbitration Centre (SIAC) vary between GBP 150 and GBP 250, depending on the member's function in the Secretariat.
- i. The International Court of Arbitration of the International Chamber of Commerce (ICC)**
 In an ICC proceeding, the arbitrator's fee and administrative charges depend on the amount in dispute (*ad varoem* system). The ICC offers a cost calculator on its website, which will provide an estimate of the cost of an ICC proceeding according to the current fee standards.
 For the arbitrator's fee, the ICC Rules set a minimum and maximum amount. The ICC Court determines the exact cost by taking into consideration the specific circumstances of the proceeding, such as, for example, how complex the case is or how timely the tribunal rendered the award. Where there is a tribunal involving three members, the arbitrator's fee is multiplied by three.
 The administrative charges are based on a fixed percentage of the amount in dispute.
- ii. The London Court of International Arbitration (LCIA)**
 In LCIA arbitration, the arbitrator's fee and administrative charges are largely fixed on an hourly rate basis.
 After a party has nominated or the LCIA has selected an arbitrator, the LCIA's Secretariat asks the arbitrator to advise the hourly rate applied in the case. The LCIA's Schedule of Costs generally sets a cap to this hourly rate, which is currently GBP 450 (USD 608.93 as of 10 January 2018).
 In practice, the LCIA Court will recommend a certain maximum rate based on the circumstances of the case before the arbitrator advises the Secretariat about their hourly rate. The recommended fee is often lower than the maximum rate. Normally, arbitrators follow the LCIA Court's recommendation. In cases with a modest amount in dispute, arbitrators have charged hourly rates of between GBP 150 and GBP 200.
 Administrative charges consist of the time-based charges of the Secretariat, a non-refundable registration fee and an additional fee equal to 5% of the total arbitration fee. The hourly fees of the members of the Secretariat
- iii. The Arbitration Institute of the Stockholm Chamber of Commerce (SCC)**
 As in the case of an ICC proceeding, the SCC's arbitrator's fee and administrative charges depend on the amount in dispute. The SCC also offers a cost calculator on its website.
 As with the ICC Rules, for the arbitrator's fee, the SCC Rules set a minimum and a maximum amount. However, where there is a three-member tribunal, the arbitrator's fee is not multiplied by three. Instead, the SCC's cost schedule defines the fee for the chairman of the tribunal only. The co-arbitrators generally receive only 60% of such fee.
 The administrative charges are based on a fixed percentage. As typical for the *ad varoem* system, the cost of the proceeding is dependent on the value of the transaction in dispute; the higher the value, the higher the cost. Overall, arbitrators' fees and administrative charges are considerably lower when compared to the ICC. The higher the amount in dispute is, the bigger this gap is, which means that in proceedings with a high amount in dispute, the cost difference is substantial.
- iv. The Singapore International Arbitration Centre (SIAC)**
 As in ICC and SCC arbitration, the SIAC's arbitrator's fee and administrative charges depend on the amount in dispute. The SIAC offers a cost calculator on its website also.
 For the arbitrator's fee, the SIAC Schedule of Fees sets only a maximum amount payable to each arbitrator. As an alternative to the Schedule of Fees, the parties may agree on another method for determining the arbitrator's fees. For the administrative charges, the SIAC Schedule of Fees also sets a cap only.
 The SIAC costs range somewhere in the middle between those of the SCC and the ICC. In comparison to the SCC, the gap between costs is subject to the amount in dispute involved.

NOTE:

It is important to note that the institution would not only claim a first filing fee but will also require some pre-payments to be made. (The International Centre for Settlement of Investment Dispute requires a \$25,000 upfront before a matter is submitted to it). Those pre-payments may be claimed before any meaningful step in the proceeding. Also, the total cost of an arbitration proceeding is more than the sum of arbitrator's fee and administrative charges.

Depending on the applicable law in the arbitration proceeding, these legal fees may become a major cost driver. For example, even if the LCIA appears to be an affordable option compared to the ICC and SIAC, assuming that the seat of arbitration was London and the applicable law was English law, costs might add up quickly when a Turkish party requires legal advice from an English law firm.

Conclusively, when it comes to cost, although it is important, it is not everything. The ICC is the most expensive institution; it is yet the most popular. There are other attendant considerations when deciding an arbitral institution, although cost is important.

Privacy

Privacy of arbitral proceedings is one of the key advantages of arbitration. The seat of the arbitration will often determine what level of privacy and confidentiality is provided and, where confidentiality is regarded as important, contracting parties should cater for it in their arbitration agreement. That said, the approach of the institution towards confidentiality may also be a factor when choosing the arbitral institution; not all institutions provide for it as a default rule. The LCIA and DIFC-LCIA Arbitration Centre (DIFC-LCIA) rules, for example, require the parties to keep confidential all awards in the arbitration, as well as all materials created for the purposes of the arbitration, and all other documents produced by a party in the proceedings not otherwise in the public domain. Deliberations of the tribunal also remain confidential, and neither institution publishes awards without the prior written consent of the parties and the arbitral tribunal. The ICC Rules, on the other hand, do not automatically

oblige parties to keep awards, materials and documents confidential, but simply empower the tribunal, upon the request of a party, to make orders concerning the confidentiality of proceedings or any other matters in connection with the arbitration. Further, its Rules do not expressly prohibit publication of awards, and the ICC regularly publishes anonymised excerpts from awards. From 1 January 2019 the ICC has adopted an opt-out approach to publication of its awards: underacted awards may be published within 2 years of notification, unless a party objects or requests redaction.

Expertise in Certain Types of Cases/Industries

Another distinguishing feature that parties may look for is whether the institution has expertise in the particular type of case likely to arise under their contract or in the particular industry in which they operate. A number of specialist institutions have been set up to handle disputes in particular areas and industries. Examples include:

- The Panel of Recognised International Market Experts in Finance (P.R.I.M.E. Finance), an institution offering mediation, arbitration and other dispute resolution services to the finance sector;
- The World Intellectual Property Organisation (WIPO) Arbitration and Mediation Centre, which caters for intellectual property and technology disputes;
- The Court of Arbitration for Sport (CAS), which administers sports-related arbitrations; and
- The Chambre Arbitrale Maritime de Paris which administers and supervises maritime arbitrations.

These institutions publish rules tailored to the types of disputes they deal with, and maintain rosters of arbitrators who specialise in those types of disputes. Most of the major arbitral institutions (like the ICC and LCIA) do not specialise in this way; the argument being that there is no need for the institution to be specialised as long as the selected arbitrator is a specialist, or is permitted by the institution's rules to appoint experts and/or rely on expert evidence from party-appointed experts. Nevertheless, parties may feel more comfortable dealing with an institution that specialises in its field.

Fast-Track Arbitration and Early Determination

In a survey of international arbitration users, 92 per cent of respondents were in favour of the adoption of a simplified "fast track" arbitration procedure for claims under a certain value (2015 International Arbitration Survey: Improvements and Innovations in International Arbitration by the School of International Arbitration at Queen Mary University of London). Certain institutions provide for expedited arbitration, which can be on a documents-only basis and before a sole arbitrator. For example, under the SIAC Rules, the expedited procedure can be applied for where the aggregate amount in dispute does not exceed SGD 6 million, the parties agree to use the procedure, or in cases of exceptional urgency. The SCC also has separate expedited rules which the parties can agree to use. As from 1 March 2017, the new ICC expedited procedure will automatically apply to ICC arbitrations where the amounts in dispute are below USD 2 million. Parties can choose to use the procedure for higher value cases. If contracting parties want to have the flexibility to adopt a fast-track procedure, this should be taken into consideration.

COMPARATIVE ANALYSIS OF SOME TOP ARBITRATION INSTITUTES

Various arbitration institutions have their own system of operations according to various features. Let us look at some of the top institutions and how they operate regarding the following: Suitability/particularity, method of commencing actions, number of arbitrators, appointment of arbitrators, procedure, timeframe for preparation of award.

1. Hong-Kong International Arbitration Centre:

- i. **Suitability:** International arbitrations of all types, and is a common choice for transactions involving a party from the People's Republic of China.
- ii. **Method of Commencing Actions:** By notice in writing to HKIAC and all other parties.
- iii. **Number of Arbitrators:** In the absence of agreement between the parties, HKIAC decides whether one or three is appropriate.
- iv. **Appointment of Arbitrators:** Where there is one arbitrator, the parties jointly designate an arbitrator, failing which HKIAC will

appoint. Where there are three arbitrators, each party designates one arbitrator and the designated arbitrators nominate the presiding arbitrator, failing which the HKIAC will appoint.

- v. **Procedure:** Subject to the HKIAC Rules, the tribunal has discretion on how to conduct proceedings
- vi. **Timeframe for Preparation of Award:** Save for arbitrations under the expedited procedures, there is no prescribed time frame for delivery of an award.

2. International Court of Arbitration of the International Chamber of Commerce (ICC):

- i. **Suitability:** International arbitrations of all types, particularly where the parties come from very different backgrounds or those where administrative support or guidance is of benefit.
- ii. **Method of Commencing Actions:** By request sent to the Secretariat of the ICC Court, which then notifies the respondent.
- iii. **Number of Arbitrators:** In the absence of agreement between the parties, one, unless the ICC decides three is appropriate.
- iv. **Appointment of Arbitrators:** The parties by agreement or nomination (to be confirmed by the ICC Court). In the absence of agreement, the ICC Court will appoint the arbitrators.
- v. **Procedure:** The parties may supplement the Rules in their arbitration agreement. Subject to the Rules, the tribunal has discretion in how to conduct proceedings.
- vi. **Timeframe for Preparation of Award:** Six months from the signature of the Terms of Reference unless the ICC Court specifies otherwise. This is extendable and the ICC can take the efficiency and expeditiousness of the tribunal's handling of the dispute into account when deciding fees. Extensions are typically granted.

3. London Court of International Arbitration (LCIA)

- i. **Suitability:** International arbitrations of all types. Often used in disputes involving either a Russian and/or Common Wealth of Independent States (CIS) related party

- and/or a party ultimately controlled by a Russian/CIS entity
- ii. **Method of Commencing Actions:** By request sent to the LCIA and the respondent.
- iii. **Number of Arbitrators:** In the absence of agreement between the parties, one, unless the LCIA decides three is appropriate.
- iv. **Appointment of Arbitrators:** The LCIA Court with reference to the methods or criteria agreed by the parties. The parties can nominate an arbitrator but only the LCIA Court can appoint.
- v. **Procedure:** The parties and tribunal shall make contact within 21 days of notification of the formation of the tribunal. The parties may agree on joint proposals for the conduct of the arbitration and are encouraged to do so in consultation with the tribunal.
- vi. **Timeframe for Preparation of Award:** As soon as reasonably possible (the tribunal shall endeavour to do so no later than three months following the parties' last submissions), in accordance with the timetable notified to the parties and the Registrar.

INSTITUTIONAL ARBITRATION IN AFRICA

Currently, nearly 100 arbitration institutions of various sizes and areas of focus exist across Africa. As expected, most of these institutions will not earn strong global or even regional reputations. At the moment, at least, the ICC and the LCIA continue to dominate international arbitration in Africa, as they do international arbitration worldwide. In a 2018 survey of almost 800 arbitration practitioners and users by White & Case and Queen Mary University, African respondents chose the ICC and LCIA as the top two institutions. The Lagos Court of Arbitration (LCA) ranked as the highest African arbitration institution, although in sixth place. So, despite the multitude of emerging African arbitration institutions, most African users appear to continue to prefer to resolve their disputes primarily under the auspices of the ICC and LCIA.

The reasons for this are complex and multi-faceted, though this preference is most likely linked to the ICC's and the LCIA's proven track records and substantial experience, which underlie their well-established reputations. The emphasis on

reputation, recognition and experience effectively results in a greater weighting towards long-established institutions. This means it may take a long time before newer arbitration institutions in Africa can build their own international following and performance track record.

No matter how high-quality an arbitration institution's administration, it takes a long time for that quality to translate into reputation and then utilization. For example, the Singapore International Arbitration Centre (SIAC) commenced operations in 1991, but did not register 90 new cases in one year until 2006. The number of new SIAC cases increased to 160 in 2009, and SIAC has received a steady inflow of new cases each year since then, with 479 new cases in 2019.

Recent trends suggest that parties are increasingly using top African arbitration institutions to resolve their disputes. According to survey respondents in the School of Oriental and African Studies (SOAS) Arbitration in Africa Survey 2020 Report, the top five arbitral centres in Africa are the Arbitration Foundation of Southern Africa (AFSA), the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Kigali International Arbitration Centre (KIAC), the Lagos Court of Arbitration (LCA), and the Nairobi Centre for International Arbitration (NCIA). CRCICA had administered a total of 1,385 cases at the end of 2019, including 82 new cases in 2019 alone. AFSA also has a caseload of approximately 60 international matters in addition to its domestic caseload of about 500 matters.⁸ The caseloads of KIAC, NCIA and the LCA are also growing, while the MCCI Arbitration and Mediation Centre (MARC), the alternative dispute resolution arm of the Mauritius Chamber of Commerce and Industry, also remains a high-profile centre. In addition, regional institutions like OHADA's Court of Justice and Arbitration are reforming their systems to play a more prominent role as an international arbitration-administering institution. In November 2017, the OHADA Council of Ministers approved an update to the Uniform Act on Arbitration and the Common Court of Justice and Arbitration Rules to reflect recent developments in international arbitration practice.

The increase in the number of cases administered by top African arbitral institutions may be a sign

that these institutions are coming of age and developing their reputations. The growth, even if slow, of these institutions shows that users are having good experiences with them, including state-of-the-art facilities¹¹and well-trained work forces dedicated to the efficient management of arbitration disputes. Modern, party-friendly rules that cater to users' needs also reassure parties that their disputes will be resolved in a fair, efficient and transparent manner.

MECHANISM; INTERFACE BETWEEN ARBITRATION AND MEDIATION

The ability of an institute to combine both arbitration and mediation develops a hybrid process. An agreement between both parties can create a pathway for a filter process yielding a relationship that can intertwine mediation and arbitration in a process. That is mediation can take place prior to the commencement of the arbitral process or after its commencement and vice versa.

In an arbitration process, the dispute is settled by an arbitrator which is binding on both parties, while in a mediation process, the mediator does not make the decision, but guide both parties in resolving the dispute in a confidential manner and help both sides tackle difficult subjects. A mediator is a facilitator.

The ability of an institution to combine both arbitration and mediation process to ensure a collaborative agreement, there must be a combined use of mediation and arbitration emerging in a dispute resolution approach in offering parties a number of benefits. These include resolving parties' disputes cost-effectively and quickly and obtaining a binding and internationally enforceable decision. The agreement between the parties can acknowledge and provide for a filter process i.e., a contractual recognition that mediation can take place prior to the commencement of the arbitral process or after its commencement.

This is done by incorporating mediation in a tiered dispute resolution clause. The parties can agree that a mediation will take place at any stage of the arbitration process. This has the advantage of providing a formal mechanism for resolution of the entire dispute which statistically has a reasonable

prospect of success before moving on to a more complex and expensive arbitration with the associated disadvantages of that process. It gives the parties a final opportunity to resolve the dispute amicably and has positive consequences in terms of the prospect of maintaining a commercial or other relationship.

However, to date there has been little agreement on several aspects of the combined use of processes. The academic debate is ongoing about acceptable ways of combining mediation and arbitration. At the same time, there is little evidence to suggest that practitioners actually use a combination of mediation and arbitration. In a recent empirical study of the current use of mediation in combination with arbitration, the results reveal that the combined approach is used to a relatively low extent, which contrasts with widespread recognition of the benefits that it seems to offer. In vast majority of cases, the mediation and arbitration stages are conducted by different neutrals, while the mediation stage usually involves the use of caucuses.

The United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention" or the "Convention") came into force on 12 September 2020. The Singapore Convention is a significant step for international commercial dispute resolution, enabling enforcement of mediated settlement agreements among its signatories. For international businesses this means that they are presented with another viable and effective alternative to litigation and arbitration in resolving their cross-border disputes, especially during the global COVID-19 pandemic.

By facilitating a negotiated settlement between parties, mediation can usually provide them with a faster, more cost-effective and commercial method of resolving disputes than resorting to litigation and arbitration. With the aid of neutral and qualified professionals, mediated settlements focus parties onto what really matters to them, ironing out their differences swiftly in confidentiality while preserving businesses' reputation and their long term relationship. However, until the Singapore Convention, no harmonised enforcement mechanism existed for these negotiated settlements. Hence, the only remedy for a party who was faced with an

opponent refusing to honour the terms of such negotiated settlement, was to bring an action for breach of contract and then seek to have the subsequent judgment enforced, potentially in multiple jurisdictions. This was an expensive and inefficient deterrent for parties to even consider mediation for the resolution of their disputes, so they instead turned to arbitration or litigation from the outset. Now, the Singapore Convention has the potential to greatly increase the appeal of mediation as a mechanism of resolving commercial disputes with a cross-border dimension. The Convention provides parties who have agreed a mediated settlement with a uniform and efficient mechanism to enforce the terms of that agreement in other jurisdictions, in the way that the New York Convention on the Recognition and Enforcement of Arbitral Awards (the “New York Convention”) does for international arbitral awards.

CHALLENGES OF THE ARBITRATION INSTITUTIONS

The growing use and evolution of arbitration has led to a burgeoning number of global and regional arbitral institutions. Every institution is thus competing to secure, keep or expand its own share of the arbitration world.

New arbitral institutions have been set up in places such as Central Asia and Africa.

In November 2018, the Tashkent International Arbitration Centre (TIAC) was established in Uzbekistan. TIAC aims to be a viable alternative to arbitrating at Paris or London based institutions. TIAC’s paradigms of success are cost, efficiency, compliance with international best practices and top-class arbitrators. TIAC arbitration rules adopt the latest thinking in arbitration. For instance, the rules enhance transparency and legitimacy by giving additional powers to arbitrators (e.g. Articles 10 and 20 of the TIAC Rules).

In Africa, the African Court of Mediation and Arbitration (CAMAR) was established in April 2019. The Court, aiming to open new perspectives and a better-organized legal framework, handles disputes involving states, African companies and multinationals operating in the continent. Such disputes have thus far been resolved before institutions in The Hague, Paris or London. As rightly observed by Gregory Travaini, CAMAR

“could well be a contributing step towards the “Africanization” of arbitration”.

The ever-expanding list of new institutions all over the globe, illustrated by examples above, has provoked strong competition among the existing and new institutions. Internationally accredited and well-known institutions, notably in Europe and Asia, have responded with significant efforts in revising their respective arbitral rules (e.g. ICC Rules 2018 or Hong Kong International Arbitration Centre (HKIAC) Rules 2018).

The surplus of arbitral institutions has some negative effects. Among others, the perceived efforts to attract users by offering an increased number of services and tailor it to their own needs may have a direct impact on the efficiency of the proceedings, which is one of the key features of arbitration, by leading thus to unnecessary or even unwelcome delays and costs. A risk of greater concern is that “sham” institutions or even institutions that have no expertise or resources to administer arbitrations properly will, in a spill over effect, also harm the profile of established institutions and international arbitration in general. A recent example is the 18 billion Egyptian pound award administered by the Cairo-based International Arbitration Centre (IAC), where the Egyptian Criminal Court sentenced to prison both, the executive director of the IAC, under whose auspices the award was rendered, and the administrative secretary to the IAC of the arbitral institution in Cairo, for aiding and abetting the fraud. The question, yet to be answered, is whether this recent case will have any impact on the caseload of the IAC in the future.

CONCLUSION AND RECOMMENDATIONS

The best way for arbitral institutions is to establish cooperation between themselves and build similar rules. On 19 December 2017, the Singapore International Arbitration Centre (SIAC) launched its Proposal on Cross-Institution Cooperation for Consolidation of International Arbitral Proceedings (Proposal). By way of inspiration, AFSA and the Shanghai International Arbitration Centre have created the China-Africa Joint Arbitration Centre (CAJAC) in Johannesburg and Shanghai. Other innovative efforts for cooperation include the Memorandum of Understanding (“MoU’s”) signed

by the ICC aiming to facilitate knowledge sharing and best-in-class services on this field. More recently, Saudi Arabia's Centre for Commercial Arbitration (SCCA) and Dubai International Financial Centre (DIFC) Courts have also signed a MoU. These "mutual assistance" agreements mark a milestone in the cooperation and operation of arbitral institutions all over the globe, as they strive towards harmonization and consistency among arbitral rules. Therefore, as rightly stressed by Mr. Travaini, it seems that "cooperation would be more fruitful than dry competition".

REFERENCES

1. The United Nations Commission on International Trade Law Arbitration Rules (as revised in 2010). Please note that UNCITRAL is not an arbitral institution and does not administer arbitrations.
2. 2015 *International Arbitration Survey: Improvements and Innovations in International Arbitration* by the School of International Arbitration at Queen Mary University of London. The survey is available on the QMUL's website: <http://www.arbitration.qmul.ac.uk/research/2015>.
3. See the 2018 *International Arbitration Survey: The Evolution of International Arbitration* by the School of International Arbitration at Queen Mary University of London, which recorded the reasons for respondents' preference for certain institutions. The top three reasons were "general reputation and recognition of the institution", "high level of administration (including efficiency, pro-activeness, facilities, quality of staff)", and "previous experience of the institution". The survey is available on the QMUL's website: <http://www.arbitration.qmul.ac.uk/research/2018>.
4. Paragraphs 40-46 of the ICC's updated Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration.
5. 2015 *International Arbitration Survey: Improvements and Innovations in International Arbitration* by the School of International Arbitration at Queen Mary University of London. Its 2018 survey, *The Evolution of International Arbitration*, also reflected this preference, with increased expedited procedures for claims regarded as one the key improvements that would lead to greater use of international arbitration across all industries and sectors. Both surveys are available on the QMUL's website: <http://www.arbitration.qmul.ac.uk/research/>.
<https://uncitral.un.org/en/texts/arbitration>

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