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## insights

ISSUE 1

MCCI ARBITRATION & MEDIATION CENTER



# A DYNAMIC LAW FIRM FOR A DYNAMIC WORLD

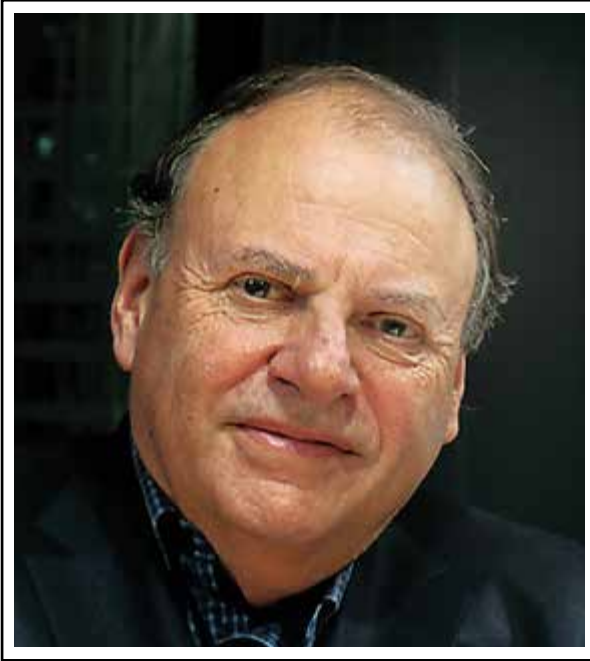
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# Message of the President of the MARC Court

**Neil KAPLAN CBE QC SBS**

President of the MARC Court;  
International Arbitrator

*Arbitration Chambers, Hong Kong*

Dear Readers,

I am very pleased to write the opening message for this first edition of MARC Insights, MARC's first Dispute Resolution review, dedicated to informing and debating on topics and issues related to Alternative Dispute Resolution.

As President of the MARC Court since 2017, I have been following with interest the evolution of the Centre, and I am proud of the achievements realised by the MARC Team in such a short period of time.

In a little less than four years, MARC has set up a world-class MARC Court and MARC Advisory Board. It also introduced the cutting-edge 2018 MARC Arbitration Rules and organised a very successful first edition of the Mauritius Arbitration Week, which I had the pleasure to launch in May 2018. This is on top of setting up MARC45 – the group for young arbitration practitioners – roadshows and participation in international arbitration events in London, Paris, Kenya, Durban, Madagascar, Reunion Island, Hong Kong, Beijing, Singapore and Seoul. The series of impressive events organised also included the second edition of the Mauritius Arbitration Week in 2019, local events to sensitise the Mauritian legal and business community, as well as training sessions organised on award-writing, tribunal secretary duties, case management and international arbitration practice.

The caseload increase is developing at a promising rate, and I have good reasons to believe that the Centre will be a flourishing one in the coming years.

The launching of MARC Insights comes at a propitious moment of the year; it is time to reflect on past achievements, on the work at hand and on the future.

This first issue has received contributions from guest writers who are well-known in the legal field, especially in arbitration and mediation. Members of the MARC Court, MARC Advisory Board and the MARC Secretariat have also touched upon important subjects in this review. We have highlighted the position of Mauritius as a bridge between Asia and Africa and also included hot topics related to alternative dispute resolution methods. In addition, we have included a spotlight on investment arbitration as well.

It also features an interview with the Honourable Yves Fortier, the latest addition to the MARC Court. Yves is an esteemed and respected arbitrator and colleague with whom I have had the opportunity to work not only as Board members of ICCA but as arbitrators. Yves also served as Canada's representative at the United Nations and thus brings to the Court great experience of international affairs. The Court is truly international and the combined experience of its members will assist MARC in developing best practices and excellence in arbitration.

This first edition of MARC Insights also features a Q&A with some members of the MARC Court and the MARC Advisory Board, keen to share their experience and insights.

I hope that you will enjoy this first MARC Insights.

Congratulations to the MARC Team on its achievements, and I reiterate my continued support towards the progress of MARC into a world-class arbitration centre.



## Editorial

**Barlen PILLAY**

Secretary General

*The Mauritius Chamber of Commerce and Industry*

Dear Readers,

I am honored to write the editorial of this first edition of MARC Insights and I seize this opportunity to congratulate all the authors who have contributed to it, as well as the MARC team for their efficiency and team work in its achievement. I wish to thank in particular, the President of the MARC Court, Mr Neil Kaplan QC, all the members of the MARC Court and the MARC Advisory Board for their relentless support towards the development of MARC since 2017.

It is also a wonderful opportunity for me to reflect on the achievements of MARC since its inception.

The MCCI as a forward-looking private sector institution conscious of the specific and complex nature of commercial disputes, the more so in international transactions, decided in 1996 to set up a Permanent Court of Arbitration, operating under its aegis. The Arbitration Court was introduced as a service to economic agents to provide them the means to better manage costs and time of dispute resolution through arbitral proceedings while satisfying the needs of promptness, efficiency and confidentiality as well as being in compliance with international standards and best practice.

At that time, Mauritius did not exist on the map of international arbitration. Domestic commercial arbitration had certainly always existed - at least dating from the 1808 Napoleonic Code - and the Mauritius Chamber of Commerce and Industry has itself conducted arbitrations dating as far back as 1855 under its auspices. But, the Region was little known in international arbitration.

For a retrospective of the main milestones:

- In 1996, the Mauritius Chamber of Commerce and Industry became the pioneer of institutional arbitration in Mauritius and the Indian Ocean Region by creating a Permanent Court of Arbitration, modeled on the ICC International Court of Arbitration.
- In 2004, the Convention of New York on the Recognition and Enforcement of Foreign Arbitral Awards Act 2004 was promulgated, allowing foreign arbitral awards to be recognized and enforced in Mauritius. The MCCI was instrumental in bringing this positive change to the international legislative profile of Mauritius as it had made numerous representations to Government to further the development of international commercial arbitration in Mauritius, focusing its efforts in

two specific directions: firstly, to convince the Government to ratify the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, and secondly, to adopt in addition to the domestic law, legal provisions for an International Arbitration Act inspired from international standards. These representations are evidenced in the 1998 Report of the Presidential Commission on Judicial Reform, chaired by Lord Mackay.

- In 2009 was proclaimed the International Arbitration Act (IAA), which came to fill the gaps of our legislative apparatus for international arbitration. Based largely on the UNCITRAL Model Law on International Arbitration, the IAA was the second pillar of the building with the ratification of the New York Convention.
- The Law Practitioners Act was also amended to allow qualified and experienced foreign lawyers in international law and arbitration to work in Mauritius.
- Moreover, since its introduction, our International Arbitration Act has not remained static but has been particularly sensitive to developments in law and practice. When it was introduced in Parliament, mention was made that the IAA would be monitored

over the years, with a view to identifying any problems with its content or possibilities for improvement.

- It is in this spirit that the law was amended in 2013. The amendments made it possible, inter alia, to introduce more clarity in the legislative provisions on the recognition and enforcement of foreign arbitral awards. They also allowed the appointment by the Chief Justice, and for a period of 5 years - of 6 Judges specialized in arbitration - the designated judges - and having the responsibility to deal with cases arising from the IAA and the 2004 Act on the New York Convention, the objective being to allow these judges to acquire expertise in the field of international arbitration.
- In addition to Government initiatives, the Judiciary in Mauritius has been particularly supportive of the development of arbitration, for instance as exemplified by judgements such as **MALL OF MONT CHOISY LIMITED v PICK 'N PAY RETAILERS (PROPRIETARY) LIMITED & ORS and that of CRUZ CITY 1 MAURITIUS HOLDINGS v UNITECH LIMITED & ANOR.**

Arbitration finds its legitimacy in its conformity with international standards of fair trial and the rule of law. Although it is a system in its own right, arbitration has the support and supervision of the state judiciary and does not operate in a legal vacuum. With a reactive legislative apparatus, a judiciary favorable to the development of arbitration, and a reliable arbitration center such as MARC, which has stood the test of time, we have all the assets for arbitration to flourish in Mauritius.

However, there is still a long way to go and we must not rest on our laurels. Important tasks include making economic operators more aware of the benefits of using arbitration, consistently providing training in arbitration practice and developing best practices, and ensuring that MARC benefits from visibility and recognition on the international arbitration scene.

On this note, I would like to take this opportunity to congratulate once again the MARC team for the work achieved in 2019, and reiterate the complete support of the MCCI towards the development of MARC.

**“The Mauritius Chamber of Commerce  
and Industry has itself conducted  
arbitrations dating as far back as 1855  
under its auspices.”**

- Through its years of existence, MARC has administered a significant number of both international and domestic cases, ranging from less than 1 million MUR to 650,000 million MUR. MARC has also conducted several training programmes in arbitration and mediation, enabling both local and foreign practitioners to develop their skills in the field and consolidate their practice. MARC has also organised numerous workshops and conferences, including two editions of the Mauritius Arbitration Week in 2018 and 2019. It has also revamped its hearings facilities, and can now offer state-of-the-art arbitration and mediation facilities at its premises in Port Louis. The Center has also provided job opportunities for seasoned as well as younger law practitioners, whether working as counsel to parties in arbitration cases or as tribunal secretaries. Arbitral tribunals have been composed of both local and foreign arbitrators. And since 2017, thanks to a robust team headed by Mr Neil Kaplan QC, the Center has expanded its international outreach and has set up a new governance structure composed of the world's finest arbitration experts, such as Funke Adekoya SAN, Hon. Yves Fortier, Sarah Grimmer, Sophie Henry, Lord Neuberger, Prof. Marike Paulsson, David Rivkin, Prof. Klaus Sachs, Harish Salve SA, Roger Wakefield, to name a few.





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# Mauritius: A Bridge between Africa & Asia

**T**his title was the central theme of the second edition of the Mauritius Arbitration Week in June 2019. As a matter of fact, a question mark could have been added to this title or even to this theme as one could wonder whether Mauritius is really a bridge between Africa and Asia? In case this bridge does exist, which kind would it be? A cultural one? A business-orientated one? What about the relevance of this alleged bridge for international arbitration for these two continents?

## A Cultural Bridge

Geographically, the Republic of Mauritius is part of the African continent and is located in the Indian Ocean. It is located at the intersection of the African continent and the Asian continent and has a fusion of different languages, religions, and cultures. Although Mauritius is part of Africa, it has very little similarity to other African countries in relation to economy, geography, and demography. In fact, Mauritius is about 1,931 km (1,200 miles) from the southeastern coast of Africa and the total straight-line distance between Mauritius and Asia is 8650 km (5375 miles). Mauritius makes up Africa's small island nations together with Comoros and Seychelles and it is the 26<sup>th</sup> smallest country in the world.

Discovered by Arabs, followed by the Portuguese, Mauritius was successively colonized by the Dutch, French and British before its independence in 1968. These various waves of colonization shaped the

history and the diversity of this small island. Mauritian Creoles trace their origins to the plantation owners and African slaves who were brought to the sugar fields, especially when Mauritius was a French colony (from 1715 to 1810). Eventually, Mauritius became a British colony (from 1810 to 1968) when it was captured on 3 December 1810<sup>1</sup>. The British administration, which began with Sir Farquhar as governor, was followed by rapid social and economic changes, especially with one of the most important events: the abolition of slavery on 1 February 1835. Following this major step, an attempt was made to secure a cheap and reliable source of adaptable labour for intensive sugar plantations in Mauritius. Indentured labour began with Chinese, Malay, African and Malagasy labourers, but ultimately, it was India which supplied the much needed work force to Mauritius.

Today, with its population of 1.3 million, Mauritius is ethnically diverse and consists of people of Indian, Chinese, African and European ancestry, amongst others. Several religions – such as Hinduism, Christianity, Islam, Buddhism amongst others – coexist peacefully in this country. Indeed, several cultures and languages<sup>2</sup> blend in Mauritius. The country's musical genres include Sega, Bhojpuri and Saggae (a mix of Sega and Reggae). Most dishes on the island are unique, with spices making up a large part of the cuisine, which has Chinese, Indian, Creole, and European influences. The nation has 15 annual public holidays including Christmas, Abolition of Slavery, Eid-ul-Fitr, Chinese Spring Festival, Diwali amongst others.

Therefore, this country's strong historical and cultural ties have been influenced by these two continents and the existence of a cultural bridge is undeniable. On top of this bridge, these ties seem to also have a significant economic value.

## A Commercial Bridge

Mauritius has been drawing on long-established links with Asia (China and India, in particular) and Africa to position itself as a natural conduit for exponential growth in the emerging Africa and Asia trade corridor. An expression has even been created to refer to this commercial relation which is being built and which is known as the « Asia-Mauritius-Africa Corridor ».

Why would Mauritius be the ideal commercial bridge between Africa and Asia?

With its strategic position at the crossroads of major trading routes, Mauritius has always benefited from a unique position in the Indian Ocean, and now more than ever, with the growth of investment on the African continent, this unique position has been optimized so that the country becomes a trusted, viable and business and investment-friendly economic hub for the region and beyond.

The first part of this axis is Africa. Mauritius is not only part of the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA) free trade agreements, but it has recently signed the new African Continental Free Trade Agreement (AfCFTA) which is the largest in the

<sup>1</sup>It is worth noting that when the *Isle de France* (former name of Mauritius under the French period) fell to the British, article 8 of the Capitulation Treaty expressly provided that the inhabitants of the island would be free to retain their religion, laws and customs. On 28 December of that year, the English Governor Farquhar proclaimed, as stipulated by the Treaty, that the *Code Napoléon* would remain in force in Mauritius. More than two centuries have since elapsed and Mauritius is now independent (since 12 March 1968), but its Civil Code is still known as the *Code Napoléon*. The legal system in Mauritius is hybrid, as it is composed of *Common Law and Civil Law* and the highest level of jurisdiction is the Judicial Committee of The Privy Council.

<sup>2</sup>Mauritius is a multi-lingual country where English, French, Mauritian Creole, Bhojpuri, Hindi, Urdu, Chinese (Fujian/Hakka), amongst others, are languages that were and still spoken.



world to enable tariff and quota-free access to the African market. From an economic growth of 3.7 % today, the continent is expected to show expansion in growth with a sustained growth rate of more than 4 % in 2019 and beyond. Africa is indeed booming

28 Investment Promotion and Protection Agreements – with several major African and Asian economies including India, China, South Africa, Singapore but also Indonesia amongst others. Mauritius is also 13<sup>th</sup> in the world and the 1<sup>st</sup> in Africa in the World



and, the region is showing an increase in trade of more than 10 percent annually, twice its size over the last 10 years. From a market size of USD 3 trillion today, the African continent is growing exponentially and is expected to attain a GDP of USD 29 trillion by 2050.

The second part of this axis is Asia. Apart from the historical relationship between Mauritius and Asia, the country is engaging itself today in trade agreements with the two major economic blocks of Asia – India and China. Mauritius has recently finalized the Free Trade Agreement negotiations with China, which is expected to be in force in a near future. Regarding the Comprehensive Economic Cooperation and Partnership Agreement (CECPA) with India, it is expected to be finalized in the upcoming months as negotiations are still ongoing.

This means that, as a country, Mauritius has unique access to a customer base of 4 billion people worldwide, with duty and quota-free access to products and enhanced access to services. Mauritius has also secured some 46 Double Tax Avoidance Agreements and

Bank Ease of Doing Business 2020 rankings<sup>3</sup>. The combination of this eco-system to a strong and stable services economy enables Mauritius to be a strong investment and trade vehicle into the African market.

Indeed, more than USD 13 billion is structured through Mauritius for investment into Africa. Investment from Asian economies such as India, China, Singapore and Japan into the African market is high. One-fifth of Foreign Direct Investment (FDI) projects and more than half of capital investment into Africa come from the Asia-Pacific region. Most notably, Chinese FDI into Africa has been increasing dramatically, making the country the single largest contributor to FDI capital and jobs in Africa.

Furthermore, Mauritius is an international finance centre of repute and substance. Indeed, the Mauritian government and local key institutions<sup>4</sup> have been undertaking major reforms in the financial sector and the jurisdiction is now fully compliant with the Organisation for Economic Co-operation and Development (OECD) and European Union guidelines and regulations<sup>5</sup>. This

<sup>3</sup>Doing Business 2020, Economy Profile: Mauritius, World Bank Group available at: <https://www.doingbusiness.org/content/dam/doingBusiness/country/m/mauritius/MUS.pdf>

<sup>4</sup>Such as the Mauritius Revenue Authority, the Financial Services Commission, amongst others.

<sup>5</sup>Read more about Mauritius being compliant with EU Tax Good Governance Principles via the following article: <http://www.govmu.org/English/News/Pages/Mauritius-compliant-with-EU-Tax-Good-Governance-Principles.aspx>

country has even been the first jurisdiction to launch the Digital Asset Custodian License<sup>6</sup>. The island nation ranks first among African countries on international indices, including ICT development, good governance, ease of doing business, political and social stability, and economic freedom amongst others. With the digitization of assets and transactions, Mauritius has set its sight on becoming a FinTech hub in and for Africa.

The African Development Bank estimates that there is a near USD 100 billion financing gap to meet Africa's infrastructure needs annually, which may come from Asia with the Belt and Road Initiative or from other regions of the world, like Europe or the Americas. There is a growing interest in Africa as an investment, trade and infrastructure development destination, and the region will be solicited more and more as a bridge. Mauritius clearly expects to position itself as an ideal, reliable, efficient, world-class destination, which investors can use to establish their head office, their financial transactions, their administrative structures, and last but not least, their dispute resolution procedures. It is estimated that the Asia Africa investment route is one of the fastest growing in the world, with financial flows of more than USD 1 trillion. According to an analysis conducted by the Mauritius Chamber of Commerce and Industry (MCCI), Mauritius can tap into providing ancillary services such as arbitration of some 1 percent of this amount. The potential for Mauritius is thus extraordinary.

Whenever and wherever there are international and commercial transactions, there is always a potential risk and a potential dispute which may arise. This means that investors need to be certain that wherever they are investing their money and other resources, they can rely on a system of justice that has the advantages of efficiency, flexibility and speed,

and meet their specific needs and constraints. These requirements can be found through the mechanisms of international arbitration and effective dispute resolution practices are one of these essential conditions.

It is within this framework that Mauritius is trying to position itself as a unique hub and a stable jurisdiction for dispute settlement mechanisms in the region and more importantly for disputes involving parties coming from « AfricAsia »<sup>7</sup>.

### **«AfricAsian» arbitration matters to be resolved in a neutral seat**

Is Mauritius a suitable and optimal seat to resolve AfricAsian arbitration disputes?

This country has created an adequate legal framework to allow arbitration to develop, namely through the International Arbitration Act (« IAA ») in 2008 based on the UNCITRAL Model Law. The Act has several innovative features including specific roles for the Permanent Court of Arbitration (PCA) which can act as an appointing authority (s.12 of the IAA), which can also be involved in matters dealing with challenge to arbitrators (s. 14 of the IAA) or the replacement of arbitrators (s.16 of the IAA). The IAA not only allows an automatic right of appeal to the Privy Council (s. 42 of the IAA) but also welcomes foreign lawyers qualified and experienced in international law and arbitration (s.31 of the IAA).

Moreover, other elements, actors and organs play in favor of the development of Mauritius as an attractive venue for Arbitration, namely a strong and independent judiciary with some of its members being specialized in international arbitration<sup>8</sup>. On top of having designated judges, the Supreme Court of Mauritius tends to have adopted a pro-arbitration stance towards the development of

international arbitration, at many occasions and through various cases. Several Supreme Court cases have proved the will of the judiciary to work towards to development of international arbitration, such as the Mall of Mont Choisy case<sup>9</sup> in which the judiciary celebrated the competence-competence principle, and also the landmark case of Cruz City<sup>10</sup> in which the Recognition and Enforcement of Foreign Arbitral Awards were also put forward and celebrated.

Furthermore, in addition to the modern legislative framework, factors which play in favour of the development of Mauritius as an attractive venue for arbitration include the following features: it is a peaceful and politically stable country enjoying a long tradition of democratic principles, of good governance and an established rule of law. It has a hybrid legal system, with a mix of common law and civilian legal systems, a mix that lends itself well to the trend in private international law. It has the advantage of being a fully bilingual country. It has a pool of skilled law practitioners, accountants and experts in international trade and finance. This financial centre of reputation has a state-of-the-art physical and ICT infrastructure, besides being a world-renowned tourist destination, a pleasing and safe country to travel to for such a stressful matter as an arbitration case.

Moreover, arbitration institutions in Mauritius, like the Mauritius International Arbitration Centre (MIAC) and the MCCI Arbitration and Mediation Center (MARC) have been created to attract cases from AfricAsia and to establish the country as the natural and neutral hub for resolving disputes involving parties from these two continents. MARC even launched last year the first edition of the Mauritius Arbitration Week (MAW) to promote the jurisdiction and attract practitioners and speakers from various jurisdictions and organized a

<sup>6</sup>More information about the Financial Services (Custodian services (digital asset)) Rules 2019 is available at: <https://www.fscmauritius.org/en/others/news/2019/fsc-issues-the-financial-services-custodian-services-digital-asset-rules-2019>

<sup>7</sup>This neologism refers to the African and Asian continents.

<sup>8</sup>Section 43 of the International Arbitration Act (IAA) even puts in place a system of six Designated Judges to hear all international arbitration matters in Mauritius, thus ensuring that all applications under the Act 2008 or the New York Convention Act are heard by specialist Judges. Pursuant to section 43 of the IAA, the Designated Judges are nominated by the Chief Justice, each for a term of five years.

<sup>9</sup>*Mall of Mont Choisy Limited v. Pick 'N Pay Retailers (Proprietary) Limited & Anor, 2015 SCJ 10, Supreme Court of Mauritius*, available at: <https://www.marc.mu/media/2924/mall-of-mont-choisy-limited-v-pick-n-pay-retailers-proprietary-limited-and-ors-2.pdf>

<sup>10</sup>*Cruz City 1 Mauritius Holdings v. Unitech Limited & Anor, 2014 SCJ 100, Supreme Court of Mauritius*, available at: <https://www.marc.mu/media/2923/cruz-city-1-mauritius-holdings-v-unitech-limited-2014-scj-100.pdf>



full week of events in the same vein as the Hong Kong Arbitration Week.

This year, MARC focused the second edition of the MAW on the following theme: « Mauritius: a bridge between Africa and Asia ». All fifteen events organised during this week included speakers, panelists, law firms, organizations and participants coming mainly from Africa, Asia and Europe.

Even if London, Paris and Geneva are still considered as the top three jurisdictions and place of arbitration institutions which are used for the resolution of disputes linked to Africa-Asia trade, it was raised during the MAW that there is an increasing trend towards the regionalisation of these disputes which would now target more cost-efficient seat and institutions based in Africa or in Asia. For Asia, this trend has already been established with Singapore and Hong Kong and it shows the significant shift in the mindsets of investors that are willing to trust and use seats that are outside Europe. During the MAW, it was also discussed that Africa is currently trying to catch up with this trend, notably through the creation of various initiatives like the Chinese African Joint Arbitration Centre (CAJAC) in South Africa. Moreover, Mauritius is also trying to establish itself as the largest contender for being selected as the African seat due to all the reasons indicated above. Mauritius could also become the neutral seat and venue for disputes related to the mining industry in Africa. Indeed, more than half of the investment into the mining industry in Africa is held in or through funds incorporated in Mauritius. Having a neutral seat with an independent judiciary, advanced legal framework and excellent arbitration centres for the resolution of mining disputes could be used as an important tool in mitigating or limiting risks and legal issues that might arise in this sector. These factors are important for investors, financiers and mining companies and Mauritius does meet these requirements. Besides, it is not only the mining industry that could be interested in choosing a neutral seat like Mauritius, but this jurisdiction might also interest other key sectors such as oil and gas, telecommunications, banking and agriculture, amongst others.

Mauritius has made a head start with the implementation of its IAA a decade ago and with the emergence of arbitral institutions like MARC which can administer disputes in both English and French as these two languages are widely used on the African continent. The development of this jurisdiction and its case law is also being closely watched by fellow practitioners abroad and more particularly in neighbouring countries as they are also trying to establish their jurisdiction as arbitration hubs. For instance, South Africa reformed its international arbitration legislation<sup>11</sup> two years ago. To tackle the criticism of being a “non-friendly” arbitration jurisdiction

by the international community, India also recently amended the Indian Arbitration & Conciliation Act 1996 with the Arbitration & Conciliation (Amendment) Act 2019 which came into force with effect from 9 August 2019.

However, the regionalisation of disputes in Africa is expected to take time as there are some barriers to overcome. Currently, Africa is dealing with a wrong perception from the investment community that there are not enough competent arbitrators of African nationality with experience in cross-border disputes. The aim of specific initiatives - such as I-Arb Africa, the African Arbitration Association, the African Promise - is to dispel that perception by increasing the visibility of African arbitrators on international platforms. On top of that, the significance of nationality and gender diversity in the selection of arbitrators, the challenges in the recognition and enforcement of arbitral awards in Africa, the development of third party funding on the continent, and the changes brought to Sino-African bilateral investment treaties over time have also been raised during the MAW 2019 in Mauritius.

Moreover, more efforts should be undertaken to attract more disputes from Africa to be resolved in Mauritius. Indeed, Mauritius should raise more awareness about its strengths among the international community in Africa and should improve its Asia-Africa Air Corridor through its connectivity towards Africa and Asia.

In conclusion, it seems that Mauritius is undeniably a cultural and a commercial bridge between Africa and Asia. Time will tell how investors and other stakeholders make good use of it as an efficient bridge for the resolution of African disputes, as the country already has all the ingredients needed to achieve this aim.



**Dipna GUNNOO**

**Barrister-at-law/ Avocat à la Cour**  
**Head of MARC**  
*Mauritius*

<sup>11</sup>South African International Arbitration Act No. 15 of 2017, GG 41347 of 20 December 2017.



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# The Recourse to Mediation under the MARC Rules

**T**he MCCI Arbitration and Mediation Center (MARC) provides Rules for Mediation and Arbitration. The first mediation case under the MARC (MCCI Arbitration and Mediation Center) was conducted in December 2016 when a dispute arose about “the date of the agreement between the parties as to the upgrading of the IT system of the Cargo Handling Corporation”<sup>1</sup>. This first case ended successfully since the mediation resulted in a binding agreement between the parties and helped to end years of unfruitful negotiations.

Mediation and Conciliation are two alternative methods to resolve disputes, which can be initiated before or during an arbitration proceeding. Companies may take advantage of these alternative tools to settle their disputes in an efficient and cost-effective way.

Indeed, mediation is an alternative dispute resolution mechanism that is often ignored by companies to settle their disputes. Unlike arbitration, mediation aims at finding a negotiated settlement agreement between the parties (art. 7.1. of the MARC Mediation Rules) through the intervention of a third qualified person – the mediator – instead of rendering a binding award. Moreover, mediation is also characterised by its strict confidentiality (art. 7.5. of the MARC Mediation Rules) and its celerity since the mediator must end his/her mission in a two months period (art. 7.6. of the Mediation Rules).

The mediation process is also very flexible. The mediator and the parties may terminate the process if it appears that an agreement cannot be found through mediation. In this case,

the parties may request to launch arbitration proceedings (art. 7.9 of the MARC Mediation Rules). If the mission of the mediator is successful, only the parties will sign the agreement. Indeed, the mediator, who is not party to the proceedings, does not sign the agreement. The mediator can only declare that the agreement has been signed in his/her presence.

Companies willing to recourse to mediation should include the model clause provided by the MCCI Arbitration and Mediation Center, which combines mediation and arbitration<sup>2</sup>, in their contracts.

Conciliation is another alternative resolution mechanism that can settle disputes between parties.

Like mediation, conciliation is rarely used by parties as shown by the ICSID numbers. Since 1972, only 9 cases have been registered under the ICSID Conciliation Rules, representing 1,3% of registered cases by the ICSID. The Africa Continent does not depart from these very low numbers since only one conciliation case was registered in 2019<sup>3</sup> and one in 2018<sup>4</sup>.

Unlike mediation, no third parties intervene in a conciliation process. However, conciliation, like mediation, is a very flexible mechanism. It can be initiated at any time either before or during the arbitration proceedings. Consequently, conciliation is a useful option for companies that wish to solve their disputes while preserving their economic relationship.

When initiating a conciliation process, parties must keep in mind their goals and therefore prevent dilatory tactical strategies. Indeed, to be

efficient the conciliation process must be strictly framed. Before initiating the conciliation process, the parties should also address specific issues to be discussed within the timeframe. The momentum in which the conciliation process is initiated implies that attention must be paid to specific points. When parties engage in conciliation at the very beginning of their dispute, they shall pay particular attention to the scope of application of the settlement agreement concluded at the end of the conciliation proceedings. Indeed, this agreement might have an impact on the arbitration proceedings that might be initiated immediately after the conciliation. When a settlement agreement is reached by the parties, it is recommended to the parties to record their settlement in the form of an award on agreed terms as provided for in article 34.2 of the 2018 MARC Arbitration Rules.

In conclusion, although mediation and conciliation are not often used by companies to settle their disputes, the procedures nevertheless constitute efficient and cost-effective alternative dispute resolution mechanisms that deserve to be taken into consideration when determining a strategy to settle a dispute.

<sup>1</sup>MCCI Annual Report 2016-2017, p. 26.

<sup>2</sup>Model Arbitration and Mediation Clauses, option 3 on Mediation and Arbitration, which reads as follows: “Any dispute, controversy, difference or claim arising out of or relating to the present contract may at any time be referred, by consenting parties, to mediation under the Mediation Rules of the (...) MARC. In the event no mediation is attempted, or if mediation is attempted and no settlement is reached within [insert the number of days] days of the commencement of the mediation, or such further period as the parties shall agree in writing, the dispute, controversy, difference or claim shall be referred, or referred back as the case may be, to be finally resolved by arbitration administered by the (...) MARC under the MARC Arbitration Rules in force when the Request for Arbitration is submitted.”

The model clauses are available at the following link: <https://www.marc.mu/en/model-clauses>

<sup>3</sup>La Camerounaise des Eaux (CDE) v. Republic of Cameroon and Cameroon Water Utilities Cooperation (CAMWATER), ICSID Case N° CONC/19/1.

<sup>4</sup>Société d’Energie et d’Eau du Gabon v. Gabonese Republic, N° CONC/18/1.

# Practical Aspects relating to the Interpretation of Public Policy in Mauritius

**E**conomic growth in Africa remains higher than in other developing and emerging economies<sup>1</sup>, expected to reach 4 percent in 2019 and 4.1 percent in 2020. Such economic growth has been partly fueled by investments made by African corporates and by foreign direct investments.

The increased investment in Africa has led to an increase in Africa-related arbitration. In 2017, 6.6 percent of ICC arbitrations involved at least one African party, an increase of 40 percent compared to 2016<sup>2</sup>. The LCIA casework reports<sup>3</sup> also shows an increase in Africa-related arbitration for the recent years. Although Africa remains sparsely used as a seat, given that disputes relate to investments in Africa, successful claimants may have to enforce and eventually execute awards in African jurisdictions.

This article attempts to briefly look at the regime for the enforcement of awards in Mauritius. In particular, the interpretation that State Courts are likely to give to public policy as a means to set aside an award and to resist enforcement is considered. Lastly, some practical views are expressed as to steps that can be taken (i) at the time of investment; (ii) before commencement of arbitration; and (iii) during the arbitration to minimise the risk of any successful arguments based on public policy that could prevent enforcement.

## 1. APPLICABLE LEGAL FRAMEWORK

In Mauritius, private rights between



parties are regulated by the Civil Code, based on French law. The law of evidence is mostly English inspired whilst the Companies Act, and the Insolvency Act are inspired from the common law. The Mauritian International Arbitration Act 2008 ("IAA"), largely based on the Model Law, provides the framework for international arbitrations in Mauritius. Further, Mauritius fully ratified the New York Convention on 15 March 2004, with reciprocity reservation, which was withdrawn on 24 May 2013.

## 2. REFUSING TO ENFORCE AN AWARD BECAUSE IT IS CONTRARY TO PUBLIC POLICY

Public policy generally pertains to the *boni mores* or values of a society. They are matters which the State or the courts determine to be of such fundamental importance that contracting parties are not free to avoid or circumvent them<sup>4</sup>.

The rationale for many countries reserving the right to enforce arbitration awards on grounds that the award or the enforcement thereof

offends public policy is to protect resident parties or parties with assets in their jurisdictions from awards that violate the most basic notions and morality and justice such that they are irreconcilable with the society in which they are sought to be enforced.

## 3. CASE LAW IN MAURITIUS REGARDING THE ENFORCEMENT OF ARBITRATION AWARDS ON GROUNDS OF PUBLIC POLICY

Under the Mauritius IAA, an application to resist the enforcement of an award is made before a three judges bench of the Supreme Court. The three judges are selected from a designated panel of judges who are specialists in the field. Appeals against judgment are heard directly by the Judicial Committee of the Privy Council.

In **Cruz City 1 Mauritius Holdings Limited v Unitech** [2014] SCJ 100, a judgment often cited as confirming the pro-arbitration stance of the Court, in rejecting the argument that the enforcement of the award would be contrary to public policy, the Supreme

<sup>1</sup>African Economic Outlook available at [https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/2019AEO/AEO\\_2019-EN.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/2019AEO/AEO_2019-EN.pdf) (last accessed on 13 February 2019)

<sup>2</sup>ICC Dispute Resolution Bulletin | 2018 Issue 2 available at <https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf> (last accessed on 13 February 2019)

<sup>3</sup><https://www.lcia.org/News/lcia-releases-2017-casework-report.aspx>

<sup>4</sup>J. Nuss QC, "Public Policy Invoked as a Ground for Contesting the Enforcement of an Arbitral Award, or for Seeking its Annulment" (2013) 7 *Dispute Resolution International* 119



Court, given the nature of the concept and its wide ranging facets, did not give one definitive definition of what it understands by public policy. Instead, it set out the threshold and the test as follows: “*Not only must the nature of the flaw in the arbitration proceedings be unambiguously described but a specific public policy must be identified and established by the party relying on it.*” This judgment further confirms that the Courts:

- do not enquire into the merits of the award under the applicable law(s) of the contract(s) between the parties to the arbitration;
- are likely to intervene only in the most exceptional cases<sup>5</sup>;

In **State Trading Corporation v Betamax [2019] SCJ 154**, the Supreme Court set aside an award and stated that, having regard to the magnitude of the contract subject matter of the dispute, its enforcement, “*in flagrant and concrete breach of public procurement legislation enacted to secure the protection of good governance of public funds, would violate the fundamental legal order of Mauritius. Such a violation breaks through the ceiling of the high threshold which may be imposed by any restrictive notion of public policy.*”

In reaching the above decision, the Supreme Court considered the approach of a number of jurisdictions, including jurisdictions that have not adopted the UNCITRAL Model Law, such as England, France and Switzerland. It would appear from the judgment that the test applicable for the purposes of Mauritian law is that, in order for a breach of a legal provision to amount to a breach of public policy warranting setting aside of the award, the breach must be “*flagrant, actual and concrete*”, as is the case under French law (*case of SNF SAS v Cytec Industries BV (Holland), Cour de Cassation, Ch. Civ., 1ere, 4 juin 2008*). The threshold to meet this standard is, however, considered very high. In this particular case, the Supreme Court held that the breach was fundamental enough to meet the required threshold, which could mean that, even though the final decision was to set aside the award, the Supreme Court will still apply the same threshold as in **Cruz City 1 Mauritius Holdings Limited v Unitech**.

#### 4. ENFORCEMENT OF AWARDS IN AFRICA GENERALLY

To guard against the possibility of a successful challenge to an IA award on the basis of public policy, the following should be considered by parties entering the arbitration:

- When concluding the substantive agreement with the counter-party, ensure that you interrogate and understand the general public policy considerations applicable in your company's or client's particular sector or business;
- Engage local counsel and seek advice on the Court of the seat of the arbitration and/or the place in which the arbitral award will be enforced;
- If arbitration is viewed as the preferred method of dispute resolution, this should be agreed at the time of concluding the contract, rather than once the dispute has arisen. This allows parties to take advice on and choose institutions and arbitration rules that are most suitable to the type of contract they are concluding, bearing in mind any applicable public policy issues;
- Choose an arbitral seat that has modern arbitration legislation and adopts the Model Law, as well as has acceded to the New York Convention. Examples are Mauritius, Kenya, Nigeria, Uganda and Rwanda;
- Institutional arbitration proceedings offer additional safeguards and more certainty than ad hoc arbitration proceedings. There are various institutions on the African continent with modern arbitration rules and robust structures to ensure a smooth and speedy arbitral process.



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<sup>5</sup>reaffirmed unambiguously in **VSOFT HOLDINGS LLC v PEEPUL CAPITAL FUND II LLC & ANOR 2017 SCJ 445**. Note however that there currently is an appeal ongoing before the Judicial Committee of the Privy Council against this judgment. Hearings took place on 4-5 December 2019.

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# Maritime Trade Disputes

## *Using Alternative Dispute Resolution to Navigate through Troubled Waters*

**I**nternational shipping has been described as ‘the lifeblood of world trade’<sup>1</sup>. As far back as one goes into history, international trade and commerce has depended significantly on the shipping industry. Today, it is estimated that the international shipping industry is responsible for the carriage of 90% of world trade<sup>2</sup>. Indeed, without shipping, import and export of goods, and the bulk transport of raw materials from country to country would simply not be possible.

While core shipping activities revolve around transportation, the industry is a complex web, with related contracts spanning from bunkering, dredging, cargo handling logistics to shipbuilding, insurance, hull cleaning, ship maintenance and repair, and agency and employment contracts.

In Mauritius, beyond the confines of shipping activities, the landscape is now set for a budding ‘Ocean Economy’ sector, which is poised as one of the country’s future drivers of economic growth. According to the Economic Development Board of Mauritius<sup>3</sup> (EDB), seafood exports have increased by some 30% and the

Mauritius fishing fleet is expected to reach 50 industrial and semi-industrial vessels by 2025. Moreover, bunker sales at Port-Louis have increased by 39% during the year 2017. Bunkering projects with a total investment to the tune of MUR 700 million have been kickstarted. Major developments in the oil and gas support service sector have also been announced. With these developments, the EDB expects that the GDP contribution of this sector will substantially increase from its current 10.5% to reach 15% in the medium term.

With such prospects, there will undoubtedly be an increased volume in cargo shipments in the region, hence more maritime related transactions, and consequently, a higher likelihood of maritime related disputes. Maritime-related disputes in Mauritius are mostly referred to state courts, with related disadvantages of long time delays, lack of confidentiality and flexibility. Alternative dispute resolution (ADR) methods such as arbitration and mediation, can be helpful to tackle such drawbacks, if used efficiently by operators.

However, it seems that economic operators are poorly aware of these

ADR options, or if they do, ADR remains an abstract option which they tend to disregard when negotiating contracts or when faced with an impending dispute. For instance, once disputes occur, if arbitration is at all resorted to, it is by far mostly redirected to arbitral tribunals seated in Europe, in venues such as London, Paris or Geneva.

One has to understand the delicate context and specificities of maritime disputes to appreciate how beneficial - since more rapid, cost efficient and flexible - alternative dispute resolution procedures, such as arbitration, can be for dealing with maritime trade disputes. Situations of ship arrests or breach of maritime contracts involve considerable loss of time and resources through goods being blocked for long time periods in international waters, with no certainty as to the applicable jurisdiction. The use of arbitration in such situations can help resolve such issues by providing the means for disputes to be resolved rapidly, through a pre-determined set of rules, in a pre-determined language and according to pre-determined procedural and substantive laws.

In addition, maritime disputes have unique features and can raise legal

<sup>1</sup><https://www.ics-shipping.org/ics-film---international-shipping-lifeblood-of-world-trade>

<sup>2</sup><https://www.maritimeinfo.org/en/Why-Maritime/Shipping-Facts>

<sup>3</sup>[http://www.edbmauritius.org/media/2092/generic\\_brochure\\_english\\_website\\_jan-2019.pdf](http://www.edbmauritius.org/media/2092/generic_brochure_english_website_jan-2019.pdf)

issues different from those found in mainstream international commercial disputes. For instance, unique to the shipping industry would be features such as charter parties, maritime liens, maritime insurance, P&I Clubs, ship and sister ship arrests, salvage, transfer of title, collisions, to name a few. As highlighted in an article of the Global Arbitration Review<sup>4</sup>, *'many of these disputes involve complex factual or technical questions that require not only the application of legal principles, but also deep knowledge of the customs and workings of the international maritime and shipping business. Perhaps more so than any other area of international commercial arbitration, arbitrators in maritime and shipping disputes are not made up solely by those who are qualified in the law, but also those with significant commercial experience.'*

Alternative dispute resolution methods, such as arbitration and mediation, allow precisely for this element of flexibility, tailored expertise and precision to be introduced in the dispute resolution process. Parties have the possibility to choose an expert, specialized in the field and conversant with its customs and usages, for resolving their dispute.

In Mauritius, Mrs Nivedita Hosanee, Superintendent of Shipping at the Shipping Division of the Ministry of Ocean Economy, Marine Resources, Fisheries and Shipping, notes that there is definitely the need to sensitize the local maritime community on the advantages of having recourse to the ADR system, the more so in the light of the expected further development of the Mauritian ocean economy which involves a string of commercial maritime activities. She also agrees that currently most shipping contracts involving international maritime players almost always refer to arbitration in London in case of any dispute. However, she explains further, getting the local partners to grasp the opportunities available



locally for dispute resolution without either having to go for arbitration in London or other faraway seats with its implied significant cost or alternatively having recourse to the judicial system, which may at times not respond to the time constraints of the parties involved, will create a snowball effect on the enhancement of ancillary maritime services.

Hong Kong<sup>5</sup> and Singapore are two jurisdictions that have successfully carved a self-sufficient niche in the sector and shown that they can have their own independent alternative dispute resolution system for maritime disputes, without these being redirected to arbitral tribunals in faraway London, Paris or Geneva.

Hong Kong, for instance, with its long history in maritime trade, a pro-arbitration judiciary and a pro-active approach in building a pool of maritime

expert lawyers and arbitrators, as well as establishing specialised maritime arbitration centers and organisations, has come a long way in terms of establishing itself as a venue for maritime arbitration. Singapore has also established itself as a reputable venue for maritime arbitration, with appropriate infrastructure, legislative and judicial support, with the Singapore Court being known for its pro-arbitration, pro-enforcement stance.

Mauritius bears a number of similarities with these two island nations, and there is no reason why more maritime arbitrations should not be taking place here, given the Government's endeavor to develop the country as a favorable venue for arbitration, a modern framework for international arbitration, based on the UNCITRAL model law, a pro-arbitration judiciary, and the existence

<sup>4</sup><https://globalarbitrationreview.com/insight/the-asia-pacific-arbitration-review-2020/1193374/singapore-chamber-of-maritime-arbitration>

<sup>5</sup><http://arbitrationblog.kluwerarbitration.com/2019/04/29/the-role-of-hong-kong-as-a-dispute-resolution-hub-in-the-greater-bay-area/>: The 2019 Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area has already foreseen further improvements to the ADR framework, namely: 'To refine the mechanism for international commercial dispute resolution, develop an international arbitration centre, support exchanges and cooperation among arbitration and mediation organisations in Guangdong, Hong Kong and Macao, and provide arbitration and mediation services to the economic and trade activities in Guangdong, Hong Kong and Macao.' This shows foresight and a clear understanding of the importance of coupling any prospected development in the maritime industry, with adequate dispute resolution mechanisms for settling related disputes.



of arbitration institutions, such as the MCCI Arbitration and Mediation Center (MARC), which provides state-of-the-art facilities for conducting arbitrations.

Mr Neil Kaplan QC, President of the Court of the MCCI Arbitration & Mediation Center (MARC), highlights the similarities of Mauritius with Hong Kong, and recalls the work done at the Hong Kong International Arbitration Center in the field, where he has acted as Chairman for 14 years. He believes that arbitration under MARC's new arbitration rules can provide for efficient, independent and neutral resolution of maritime disputes. *'The way in which Hong Kong began to wean shipowners away from London was to appeal to the many Hong Kong shipowners to change their arbitration clauses whenever they could. That led to a substantial increase in shipping cases at HKIAC. Mauritius needs to do the same,'* says Mr Kaplan. *'The MARC Court made up of arbitration specialists from all over the world can ensure the appointment of a neutral and able chair of the Tribunal in cases where the parties cannot themselves agree. MARC will administer such arbitrations in an economical and efficient manner. Why should Mauritian parties be forced to take their cases to be resolved so far away, at such cost and with such inconvenience?'*, he points out.

With the aim of promoting awareness amongst stakeholders, MARC is planning to launch a dedicated Maritime Arbitration Group, in order to pool expertise and resources in the field of maritime dispute resolution, and promote knowledge and awareness amongst the maritime business industry. In the same vein, a working group has been established with the Director of Shipping Office, for sharing information, identifying training needs, and developing best practices in the field.

Questioned on the relevance of ADR for resolving maritime disputes, Mrs. Heba Capdevila, Chief Operating Officer of Taylor Smith Group, the largest and longest standing Mauritian group of companies operating in the maritime sector, comments: *'The significant developments happening in the maritime sector translate into an increasing number of commercial and industrial agreements taking place between parties. The recourse to ADR makes a lot of sense, providing a flexibility and a responsiveness which is needed by the sector; it is also a vehicle for providing comfort, confidence, clarity and security to the various players in the sector and region,*

*as well as being aligned to international good governance practices, and contributing to the country's objectives of introducing ease of doing business measures, encouraging partnerships, attracting FDIs, and ultimately stimulating the maritime related services.'*

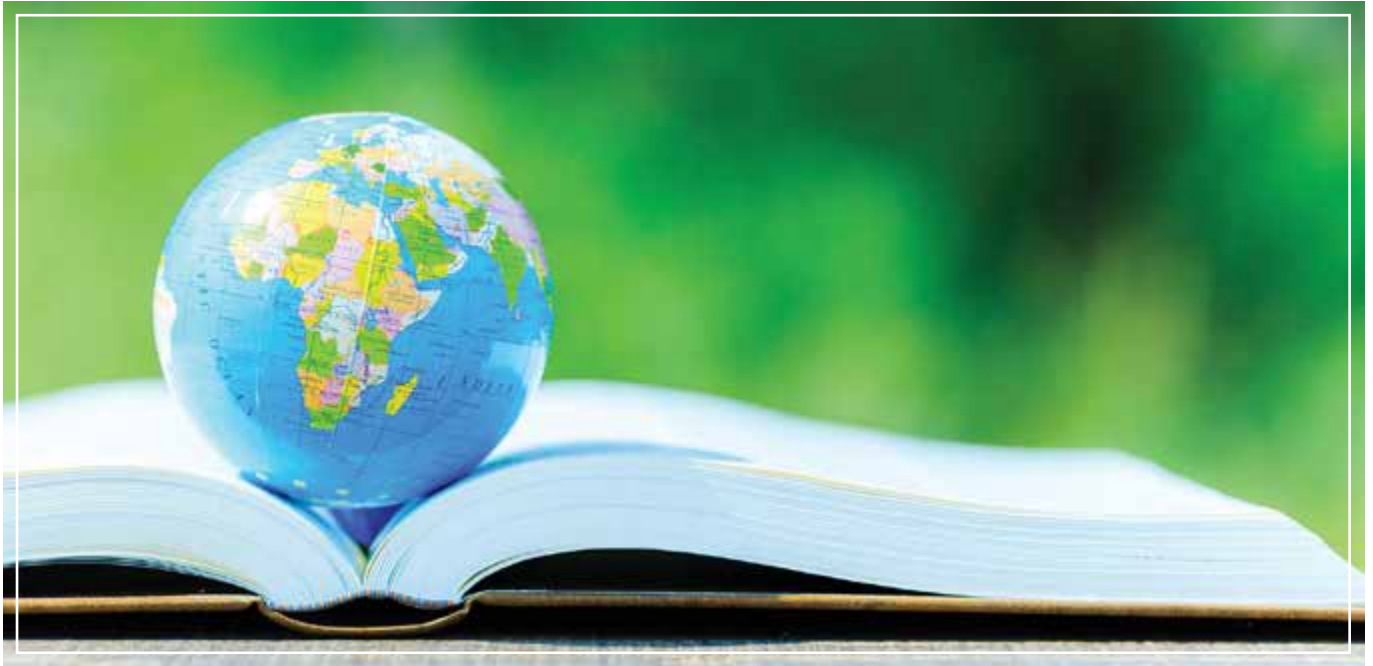
Resolution of maritime disputes through arbitration in Mauritius can be traced back to the early days of maritime trade on the island. For instance, there are records of arbitrations being held under the auspices of the Mauritius Chamber of Commerce and Industry (MCCI) since its creation in 1850. One such case, which a Mauritian historian has researched, dates back to 1855 and relates to a dispute between the owners of two trading vessels, and for which the disputants had recourse to the MCCI for its resolution through arbitration. With its emblematic stand as Star and Key of the Indian Ocean, its Exclusive Economic Zone of 2.3 million square kilometers, its budding maritime industry and its pro-arbitration legislative, judicial and institutional set-up, the country is well poised to become a venue of choice for the resolution of maritime trade disputes through arbitration. We can only hope that stakeholders recognize this and make a real sea change towards redefining their dispute resolution strategies, by relocating from state courts or far-away arbitral tribunals to closer, more local, more flexible and more efficient alternatives.



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# International Arbitration Evolution in Africa



**A**s investment and trade increases in Africa, so will the number of commercial disputes.

Across the world, arbitration has become the universally preferred option for resolving disputes. Key developments in Africa and new technologies will see the continent emerge as a real contender to host arbitrations and bring African arbitrators to the table – unseating the traditional arbitration favourites.

Arbitration's popularity is largely driven by the ability of parties to select arbitrators (with the necessary qualifications and experience), the fact that arbitration awards are confidential and that it is a less formal process and more expeditious process than litigation.

Historically, the preferred seats for parties to arbitrate their disputes have been London, Paris, New York and Singapore. The popularity of these destinations rests on their general reputation, recognition and enforceability of awards as well as the formal legal infrastructure. Africa is, however, moving quickly to become a real arbitration hub and here's why:

- Several African countries have acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention. As the name implies, the New York Convention applies to the recognition and enforcement of arbitral awards – making more of these awards enforceable in Africa.

- Countries like Egypt, Kenya, Mauritius, Rwanda and South Africa are developing strong formal arbitral infrastructures to facilitate and support African Arbitration. For example, South Africa recently enacted the International Arbitration Act, adopting the UNCITRAL Model Law on International Commercial Arbitration (with a few minor amendments). Mauritius also offers the MCCI Arbitration and Mediation Centre (MARC) which provides modern and sophisticated conference and hearing rooms for arbitration proceedings at very competitive rates.

- Following these developments in legislation and infrastructure on the continent, the 2018 SOAS Arbitration in Africa Survey Report shows that many African legal practitioners are honing their skills and expertise

in arbitration with several African arbitrators having been formally trained in arbitration. The report indicates that African arbitrators now hold the same qualifications and skills as their foreign counterparts – but in practice, their costs are often much lower. An attendant benefit of using African arbitrators for African disputes, is that African arbitrators are often alive to regional nuances that are difficult to come by in arbitrators from other jurisdictions.

- Championing Africa's expertise, the China-Africa Joint International Arbitration Centre (CAJAC) also provides for the resolution of disputes, having Johannesburg or Shanghai as the chosen seat for arbitration.

Following from this, Africa is moving itself towards global recognition on the international arbitration front. But it is not just developments on the continent which are turning the tide in making arbitration more accessible – but also the possibilities that technology offers.

At Webber Wentzel, we are currently working with our technology experts to explore how we might be able to use some of our technology tools to



create greater efficiency in the running of arbitrations in Africa. One possibility we see is using video conferencing platforms that allow multiple individuals in various locations to be connected on the videoconference simultaneously to eliminate travel time and costs to the chosen seats of arbitration. We are also looking to test functionality that can record the proceedings and transcribe such proceedings in real time while using the conferencing platforms, saving time and costs in appointing transcribers after the proceedings and having to wait for transcripts. Additional tools for sharing and controlling access to large volumes of documents to designated groups may also offer significant value in running arbitrations in daily practice, providing that confidentiality and security of information as well as its accessibility and reliability can all be maintained.

Between the key legislative and infrastructure developments in Africa and embracing what new technologies have to offer – many of the norms of international arbitration to date may be disrupted, making arbitration more accessible than ever before.



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# Changing Landscape of Confidentiality in International Arbitration

Confidentiality of arbitral proceedings is often attributed as the driving force behind the growth of international arbitration in the last sixty years. But, as Redfern and Hunter mentions, though confidentiality still remains a key attraction of arbitration “...the once-general confidentiality of arbitral proceedings has been eroded in recent years...”.<sup>1</sup> Recently, in the 2018 International Arbitration Survey: The Evolution of International Arbitration, conducted by White & Case and Queen Mary University of London, 87% of respondents believed that confidentiality in international commercial arbitration is of importance. However, confidentiality is not of itself the single biggest driver behind the choice of arbitration.<sup>2</sup>



Professor Gary Born suggests that due to an absence of international norms prescribing a duty of confidentiality, the national legal systems have taken widely differing approaches on whether international arbitration proceedings are confidential, and the scope of any implied confidentiality obligations<sup>3</sup>.

The UNCITRAL Model Law is silent on confidentiality in international arbitration, and therefore many jurisdictions, such as the United Kingdom, Korea, Japan, the Federal Arbitration Act in the United States, the Swiss law do not stipulate any express obligations. However, some arbitral institutions, such as London Court of International Arbitration (LCIA)<sup>4</sup> and Singapore International

Arbitration Centre (SIAC)<sup>5</sup> prescribe that arbitral proceedings shall remain confidential. The International Chamber of Commerce (ICC) rules prescribes that upon the request of a party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.<sup>6</sup>

One important distinction which should be kept in mind, is between ‘privacy’ and ‘confidentiality’ of the arbitration proceedings. Privacy of international arbitration proceedings would mean that third parties, or parties not connected to the arbitration proceedings except the

counsel, the expert witnesses or the transcribers would not be allowed to sit in the arbitration proceedings. This is almost always applied and must be distinguished from the duty of confidentiality, which means that disclosures about the arbitration proceedings cannot be made to any third party, without prior consent.

## Position in India

The Indian Arbitration and Conciliation Act, 1996 (Act) has gone through a sea change in the recent past. In the 2019 amendments, an express duty of confidentiality has been incorporated in the Act. In terms of the newly inserted Section 42A of the Act the parties, the arbitrators and the arbitral institution are duty

<sup>1</sup>Chapter 1. An Overview of International Arbitration’, in Blackaby Nigel, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Sixth Edition), 6th edition (Oxford University Press 2015) pp. 30.

<sup>2</sup>Available on <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf> (accessed on 28 November 2019).

<sup>3</sup>Gary B. Born, *International Commercial Arbitration* (Second Edition), 2nd edition, Chapter 20: Confidentiality in International Arbitration’, Kluwer Law International 2014, pp. 2784 and 2785.

<sup>4</sup>See Article 30 of the LCIA Rules, 2014.

<sup>5</sup>See Rule 39 of the SIAC Rules, 2016.

<sup>6</sup>See Article 22 (3) of the ICC Rules, 2017.

bound to maintain confidentiality of all arbitral proceedings, except when the disclosure of an arbitral award is necessary for the purposes of implementation and enforcement of an award. The origin of the newly inserted provision can be traced back to the high-level committee chaired by Justice B N Srikrishna (Retired Judge, Supreme Court of India), which had suggested reforms for improving institutional arbitration in India. The report suggested insertion of the confidentiality provisions along with certain exceptions, such as: disclosure required by legal duty, to protect or enforce a legal right, enforcement or challenge to an arbitral award before

obligations of counsel, witnesses, transcribers, tribunal secretary etc. in this regard. Further, there is no penalty prescribed for a breach of the obligation and it is also not clear as to which forum will adjudicate a breach of such an obligation.

### Position outside India

In the United Kingdom, there are no express obligations on confidentiality of arbitral proceedings, and confidentiality is presumed unless the arbitration agreement states otherwise. The exceptions have been set out in the decision of *Ali Shipping Corporation*<sup>8</sup> and include:

of the English Court in *Ali Shipping Corp*, has held that the leave of the court is not required in circumstances where disclosure of information is reasonably necessary for the protection of a party's legitimate interest.

### Transparency v. Confidentiality

As the world moves towards transparency, do we need confidentiality as an express statutory obligation, or are we better off if the arbitral awards are published thereby lending more transparency to the process? The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)<sup>12</sup> provides an answer to this conundrum, by applying the test of "what to disclose" instead of "when or to whom to disclose". The Rules advocate greater transparency in investment arbitration to further public interest and provide for public access to 'key documents' prepared during the course of arbitral proceedings. At the same time, confidential or protected information has been adequately safeguarded under the exception to the rules.

A similar threshold could also be contemplated for international commercial arbitrations. Arbitral awards could be published after redacting any information which is commercially sensitive or which may disclose or jeopardise the business interest. Parties may not disclose sensitive redacted information except under exceptional circumstances such as during challenge or enforcement proceedings or for interim reliefs. Greater transparency in this manner would benefit international arbitration by bringing in more accountability for the arbitrators and helping in development of a jurisprudence on certain points of law. Although unlike national courts, the decision of the arbitral tribunal is not binding, guidance can certainly be taken from



...confidentiality is not of itself the single biggest driver behind the choice of arbitration



a court or judicial authority<sup>7</sup>.

The limited exception to the confidentiality obligation, i.e., for implementation and enforcement of an award, poses serious challenges to the process of arbitration. In turn it also makes the confidentiality obligation under law more susceptible to violations. For example, the provision does not take into consideration that disclosure of the arbitral proceedings may be required in case of seeking interim protections or several other court proceedings in relation to the conduct of the arbitration. Disclosure may also be required in cases where experts are engaged to work on a dispute, third party funding is required or disclosures relating to an arbitration are necessitated under applicable laws. While the newly inserted provision obligates arbitrators, parties and arbitral institutions to maintain confidentiality, it is silent on the

(a) disclosures made with express or implied consent of the party who produced the material; (b) by order or permission of the court; (c) when reasonably necessary for the protection of the legitimate interests of an arbitrating party; (d) when disclosure is necessary in public interest.<sup>9</sup> In *Glidepath BV v Thompson*<sup>10</sup>, the Court observed that a stranger to the arbitration should not in general be given access to the documents, unless an exception as aforementioned is attracted.

In Singapore, the (Singapore) Arbitration Act and the (Singapore) International Arbitration Act do not explicitly impose a duty of confidentiality, and there is always an implied duty subject to the limitations. The position is similar to the UK, and the High Court of Singapore in *Myanma Yangon Chi Oo Co Ltd v Win Win Nu*<sup>11</sup>, after relying on the decision

<sup>7</sup>Page 72, Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India, available at <http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf> (accessed on 28 November 2019).

<sup>8</sup>*Glidepath BV v Thompson* [2005] EWHC 818 (Comm).

<sup>9</sup>*Ali Shipping Corp v. Shipyard Trogir*, [1998] 2 All ER 136.

<sup>10</sup>[2005] EWHC 818 (Comm).

<sup>11</sup>[2003] SGHC 124.

<sup>12</sup>For a detailed analysis, please see 'UNCITRAL brings in new transparency rules with effect April 1, 2014 in treaty based investor state arbitration', available on [http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/uncitral-brings-in-new-transparency-rules-with-effect-april-1-2014-in-treaty-based-investor-state-a.html?no\\_cache=1&cHash=d1a716f314a5dc88c269b0a5f6eba054](http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/uncitral-brings-in-new-transparency-rules-with-effect-april-1-2014-in-treaty-based-investor-state-a.html?no_cache=1&cHash=d1a716f314a5dc88c269b0a5f6eba054).



the rulings of the prior tribunals on the same issue. Parties may be able to avoid investment of substantial time and money if arbitral awards written by leading practitioners are available to the public.

However, while promoting transparency, the importance of confidentiality must not be lost or undermined and a balanced approach is essential. It must be recognized that parties to an international commercial arbitration go to great lengths to protect their business interests. In fact, many a time they choose arbitration to ensure that adverse awards do not become public. Alongside, arbitrating parties also must acknowledge that in the age of social media and legal publishers such as Global Arbitration Review or Investment Arbitration Reporter, which frequently reports about the nature, stage, the parties involved, the sum involved in the arbitral proceedings, there is very little to hide about the existence of the arbitration proceedings or even its outcome. Therefore, instead of projecting confidentiality and transparency as arch nemeses, the legislators, arbitrators and parties must align the two principals to further the development of international arbitration.



**Vyapak DESAI**

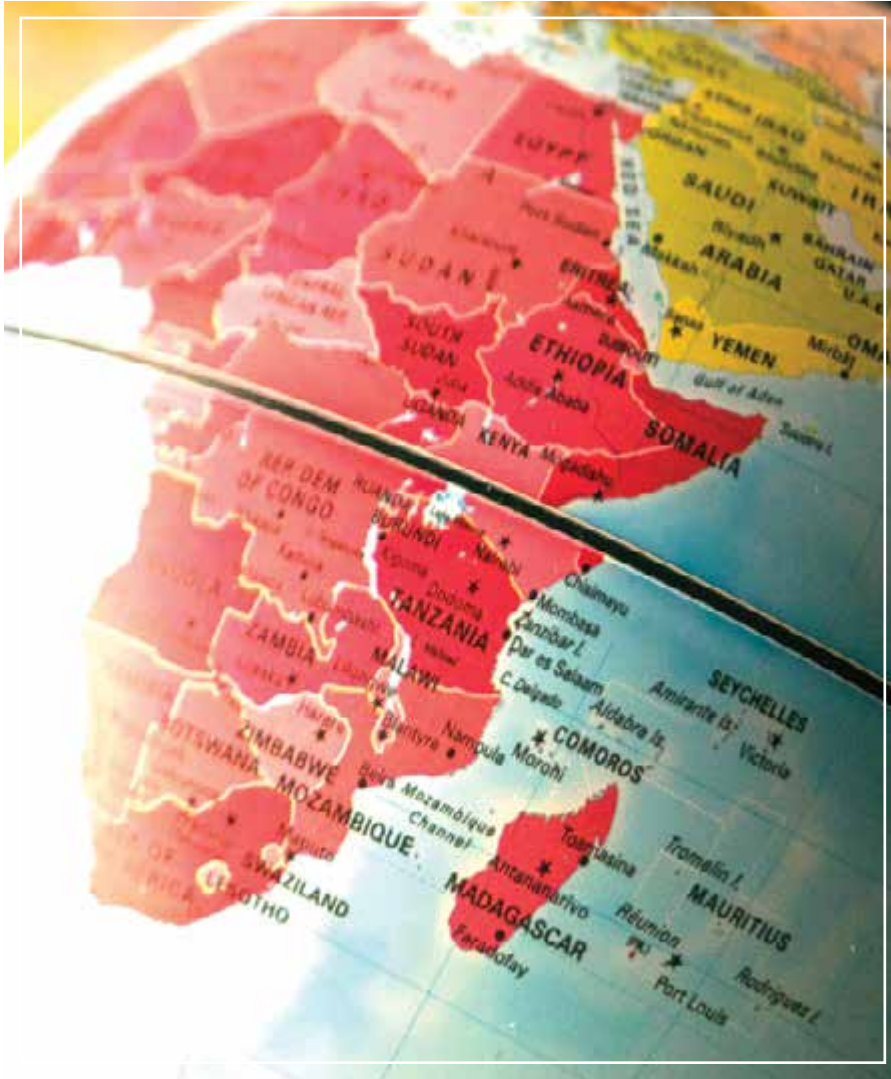
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Leader  
*Nishith Desai Associates*  
*India*

# Arbitration Centres in Africa: Too Many Cooks?



that promotes interreligious dialogue, economic independence, cultural diplomacy, innovation, good governance, sustainable development, pan-African patriotism and solidarity among the peoples of the African world. According to its Vice President, Abdelkrim Benkhalfallah, CAMAR is “an independent organization which is adapted to the socio-economic environment of the African continent”.

The Court is the first of its kind on the African continent. It currently has 11 chambers covering a number of industries, including commercial contracts, banking and finance, tourism, real estate, sports, engineering, intellectual property, environment and oil and gas. CAMAR has ambitions to open representative offices in every African capital and branches in Europe and the United States of America.

Ali Ouhmid, President of CAMAR's Founding Committee and member of the *Cour Internationale de Médiation et d'Arbitrage* (CIMEDA) – International Court of Mediation and Arbitration – explains that “there are several arbitral courts before which all disputes affecting Africa are dealt with (...). Our goal is to unite all African countries around the creation of CAMAR. It reminds us that skills that exist in Africa can be valued to help resolve disputes”. Abdelkrim Benkhalfallah adds that “setting up CAMAR aims first and foremost at having the maximum number of African arbitration cases handled on African soil by internationally recognized African arbitrators, who are competent and who put their expertise to work elsewhere”.

The above clearly confirms the current trend to open up new perspectives in relation to the resolution of international disputes involving an African element. CAMAR could well be a contributing step towards the “Africanization” of arbitration. But, will it make a difference?

“Too many cooks spoil the broth” - this expression works in both personal and professional situations. Everyone can relate to this universal concept that where each of many people involved in a common project adds his or her own idea, it actually makes it very hard, if not impossible, to work efficiently and can even end up ruining the project. With this in mind, the present article reflects on whether the fast-growing development of arbitral institutions on the African continent benefits the development of arbitration as a credible dispute resolution mechanism locally.

A newcomer...

On 5 April 2019, 6 years after a meeting in Strasbourg (France), a constitutive congress set up the *Cour Africaine de Médiation et d'Arbitrage* (CAMAR) – the African Court of Mediation and Arbitration – during a conference held in Marrakech on mediation and arbitration. The conference was organized by the founding committee of the CAMAR, with the support of the *Fondation Trophée de l'Africanité* – the Africanity Trophy Foundation, an organization

that promotes interreligious dialogue, economic independence, cultural diplomacy, innovation, good governance, sustainable development, pan-African patriotism and solidarity among the peoples of the African world. According to its Vice President, Abdelkrim Benkhalfallah, CAMAR is “an independent organization which is adapted to the socio-economic environment of the African continent”.



### ... Amongst Many

Globally, arbitration has become a (if not 'the') preferred means of dispute resolution. As international investment and trade on the African continent is surging, the number and frequency of commercial and investment disputes in Africa have inevitably increased. Yet international arbitration, even with an African element, has traditionally been administered under the aegis of western institutions such as the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and International Centre for Settlement of Investment Disputes (ICSID). In 2017, the ICC itself had 87 new cases involving Sub-Saharan African. As a result, recently and more intensively in this past decade, many African arbitral institutions have flourished across the African continent.

Today, nearly 80 arbitral institutions exist (and counting). An impressive number considering that the continent comprises 54 countries in total. In a recent AfricArb event held at the Hong Kong International Arbitration Centre on *Africa: El Dorado or Mirage?*, it was said that the number of arbitration centres on the African continent seem disproportionate.

Some countries host multiple arbitration centres. For instance, Nigeria has at least six: the Regional Centre for ICA Lagos, the Maritime Arbitrators Association of Nigeria, the Lagos Court of Arbitration Centre, the International Centre for Arbitration & Mediation, Lagos Chamber of Commerce International Arbitration Centre and the Janada International Centre for Arbitration & Mediation. South Africa also has six: the Arbitration Foundation of Southern Africa (AFSA), the Equillore Group, the Africa Alternative Dispute Resolution, the Association of Arbitrators, the Commission for Conciliation, Mediation & Arbitration and the Tokiso Dispute Settlement. Egypt has three: Cairo Regional Centre for ICA (CRCICA), the Sharm El Sheikh International Arbitration Centre and the Dr A Kheir Law & Arbitration Center.

Even smaller countries follow the same trend. Sudan hosts three arbitral institutions: the Arab Centre for Arbitration, the International Chamber of Arbitration and the Sudanese Centre for Conciliation & Arbitration. Ghana also hosts three: the Ghana Arbitration Centre, the Ghana Association of Certified Mediators & Arbitrators and the Copyright Office Ghana Arbitration Centre. Mauritius, one of the smallest countries in Africa, has two: the MCCI Arbitration and Mediation Center (MARC) and the Mauritius International Arbitration Centre (MIAC).

Why such a frenzy?

### Why so many?

One could say that there are at least three reasons for the development of arbitration centres in Africa.

First, the legitimate need to capture disputes with an African element and thus "africanize" them. The African specificity cannot reasonably be overlooked in a time when diversity is not just fashionable but a true necessity that the global market is craving. As described in more detail in the London University's School of Oriental and African Studies (SOAS) publication of its Arbitration in Africa Survey – Domestic and International Arbitration: Perspectives from African Arbitration Practitioners, the perception that international arbitration, or at the very least those with an African element, cannot be dealt with correctly on the African continent itself needs to be remedied. This is part of a larger Africanisation movement, which also involves law-making. Indeed, African states have now become "rule makers" at both regional and continental levels and are no longer mere "consumers" of norms as they have been in the past, focusing notably on sustainable development, environmental protection, human rights and corporate governance.

Second, costs. Local clients and counsel repeatedly stress on the costs of arbitration proceedings under the aegis of western institutions. For example, the ICC's filing fee (regardless of the amount in dispute) is currently

USD 5,000 and its administrative costs are capped at USD 150,000. Not all international cases involve multi-million/billion dollar claims with respect to infrastructure, oil and gas, mining or construction projects. Marie-Andrée Ngwe, President of the Permanent Committee at the Inter-employers' Group of Cameroon (GICAM) Arbitration Centre, confirms that "this flowering of centres responds to a need for justice; for local economic operators, access to major arbitration centres poses difficulties in terms of distance and various costs". To address the issue of costs, especially involving common trade and commercial disputes either regionally or internationally, many institutions based in Africa offer reduced administrative and arbitrators' fees to accommodate the market's needs locally. For instance, the Nairobi Centre for International Arbitration's filing fee is less than USD 200 and its administrative fees cannot exceed USD 21,000 in international arbitration cases.

Third, the prospects of generating substantial revenues. Securing the administration of international arbitration disputes and becoming an international hub locally can be lucrative. Arbitral centres not only administer cases – a service they charge to the parties – but also offer a variety of on-site auxiliary services. For example, MARC offers excellent hearing and meeting room facilities and services at its offices in Port Louis (Mauritius) and promotes in particular local court reporters and hotels.

However, can all 80 arbitration centres thrive?

### Is it too many?

It is said that a lack of competition results in complacency and mediocrity. Competition, within the legal and business communities, is generally accepted as healthy because it encourages efficiency and strengthens the market. When it comes to international arbitration centres, competition pushes institutions to make the necessary efforts to achieve longevity, such as by administering cases skilfully, appointing competent

arbitrators and providing suitable services which take into the specificities of each case. So, what are their prospects of success on the African continent?

Some arbitral institutions have already gained international recognition.

In North Africa, CRCICA, which was originally set up for three years, has become a reference with full financial autonomy and has administered more than 1,100 cases since its creation in 1979. In recent years, CRCICA and its rules have increasingly been chosen by non-Egyptian parties – a true recognition. It is also named as a possible institution in Bilateral Investment Treaties and was ranked as one of the best centres by the African Development Bank.

In South Africa, AFSA has opened an international branch following the adoption of the 2017 International Arbitration Act and has reported more than 50 cases so far!

In East Africa, the Kigali International Arbitration Centre set up in 2012 has already administered more than 50 cases and is often cited as a successful example of an arbitral institution in the region.

In West Africa, the Common Court of Justice and Arbitration (CCJA) created in 1998 has administered around 100 cases and is very hopeful that its new rules issued in late 2017 will increase significantly the number of cases it deals with in francophone Africa.



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In Mauritius, positioning itself as a bridge between Africa and Asia, MARC, set up in 1996, has administered both in French and in English some 30 arbitration cases in the last five years, out of which 60% were domestic/regional cases and 40% were international cases. MARC's international outreach is becoming stronger as the centre is more and more active on the international front. In 2017, it decided to change its governance structure now headed by Mr. Neil Kaplan QC by inviting international arbitration practitioners. It also launched successfully the Mauritius Arbitration Week – the second edition was

held in June this year – attracting experts from all

over the world to debate on the latest trends in international arbitration.

While the arbitral community has recognized the potential of a number of institutions in the past decade, it seems that less than 10 centres have, for the time being, effectively gained credibility. The key for newly established centres may then lie in specialism. Instead of becoming an internationally polyvalent centre competing with well-established organisations worldwide, it may be wise to target a specific industry or region (or both) and rethink the institution's role in order to reach an optimal level of success. It is worth noting that AFSA and the Shanghai International Arbitration Center have created the China-Africa Joint Arbitration Centre (CAJAC) in Johannesburg and Shanghai, positing itself as a platform for managing disputes on the Belt and Road Initiative. Additionally, it seems that cooperation would be more fruitful than dry competition. Signing cooperation agreements with well-established western arbitral organizations might give credibility and encourage users to resort to local African centres. For example, on 23 June 2016 the ICC and the CCJA signed a partnership agreement reflecting their common will to work together for the promotion of international arbitration and other alternative dispute resolution mechanisms within the OHADA space through co-organized events and the ICC providing training to the CCJA staff in case administration.

The rapid multiplication of African arbitral institutions across the continent is undeniably correlated to a will to develop and promote arbitration as a means of dispute resolution on the continent. Yet, to what extent will it attain its goal of Africanizing arbitration, gaining international credibility and generating economic benefit in the region? Only time will tell...

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# The Arbitration and Conciliation Amendment Act 2019

*A new dawn or sinking into a morass?*



arbitration. The erstwhile provisions of the Arbitration and Conciliation Act 1996 ("Act") vested the Supreme Court and High Court with powers to appoint arbitrators under Section 11. This power was broadened in 2015, to include individuals or institutions being designated by the Supreme Court or High Court as the case maybe, for appointment of arbitrators, a move to encourage institutional arbitration. The 2019 Amendment now states that courts may designate institutions for appointment of arbitrators as graded and accredited by the ACI.<sup>1</sup> The ACI has been entrusted with grading of arbitral institutions basis criteria relating to infrastructure, quality and caliber of arbitrators, performance and compliance of time-limits for disposal of domestic or international commercial arbitrations.<sup>2</sup> The members who may be part of the ACI are enlisted in Section 43C of the 2019 Amendment.<sup>3</sup> This is where the root of the problem lies. A closer look at the constitution is a clear signal how the body intends to regulate the arbitration process in India, with greater government control and interference but no clarity on mode of grading, implementation and effectiveness.

The Indian arbitration landscape is thriving - three years and two rounds of changes, one too many for the practitioners, arbitrators and the domestic/foreign parties to cope with. The Arbitration and Conciliation (Amendment) Act 2015 ("2015 Amendment") came as a sigh of relief, trying to plug most of the loopholes to bring Indian arbitration at par with international standards. However, the same cannot be said about the next round of changes.

The Arbitration & Conciliation (Amendment) Act 2019 ("2019 Amendment") came into force with effect from 9 August 2019. The 2019 Amendment continues to retain most of the provisions of the Arbitration and Conciliation (Amendment) Bill, 2018,

("2018 Bill"), even the regressive ones. Despite the severe criticism and year long wait for the 2018 Bill to translate into amendment, the not so forward-looking provisions seem to see the light of the day, a clear anti-thesis to the very object of arbitration.

## Key Take-Aways

### - Arbitration Council of India

The 2018 Bill proposed the introduction of an Arbitration Council of India ("ACI") to grade arbitral institutions and arbitrators, issue guidelines, accreditation of arbitrators etc. The 2019 Amendment continues to retain them. The Justice B.N. Srikrishna Committee Report recommended the concept of ACI, with the intention to shift from ad-hoc to institutional

### - Qualifications of Arbitrators

Party autonomy is one of the basic tenets of arbitration. Introduction of this provision is another handcuff for parties to select arbitrators. The minimum qualifications, experience and guidelines for accreditation of arbitrators is specified in the Eighth Schedule.<sup>4</sup> The new amendments have faced one of the biggest criticisms, owing, amongst other reasons, to

<sup>1</sup>Section 11 (3A) of the 2019 Amendment

<sup>2</sup>Section 43I of 2019 Amendment

<sup>3</sup>(a) A person, who has been, a Judge of the Supreme Court or, Chief Justice of a High Court or, a Judge of a High Court or an eminent person, having special knowledge and experience in the conduct or administration of arbitration, to be appointed by the Central Government in consultation with the Chief Justice of India-Chairperson; (b) An eminent arbitration practitioner having substantial knowledge and experience in institutional arbitration, both domestic and international, to be nominated by the Central Government-Member; (c) An eminent academician having experience in research and teaching in the field of arbitration and alternative dispute resolution laws, to be appointed by the Central Government in consultation with the Chairperson-Member; (d) Secretary to the Government of India in the Department of Legal Affairs, Ministry of Law and Justice or his representative not below the rank of Joint Secretary-Member, ex officio; (e) Secretary to the Government of India in the Department of Expenditure, Ministry of Finance or his representative not below the rank of Joint Secretary-Member, ex officio; (f) One representative of a recognized body of commerce and industry, chosen on rotational basis by the Central Government-Part-time Member; (g) Chief Executive Officer-Member-Secretary, ex-officio.



foreign legal professionals not being eligible to act as arbitrators. This disincentivizes foreign parties to have their arbitrations seated in India as arbitrators of their choice can no longer be appointed. The international arbitration community would no longer be keen to have arbitrations seated in India.

### - Timelines

India being infamous for the long delays in litigation and arbitration, the 12-month time-frame (with 6 months extension by consent of parties) came as a breath of fresh air to the arbitration fraternity in India. Just when, all concerned parties were getting used to the strict time-frame and making endeavors to abide by it, the 2019 Amendment has extended it by initiating the 12-month time-frame, to post completing of the pleadings. Completion of pleadings can take long with no definite time-frame and could delay the arbitration indefinitely, rather than aiding the process, it could lead to considerable delays. International commercial arbitration has been excluded from the ambit of time-lines with a proviso to complete it expeditiously and endeavor to finish within 12 months of completion of pleadings. Both these changes have invited harsh criticism. There was no requirement to leave international commercial arbitration out but rather, a simple change, that of leaving out institutional arbitration, i.e. leaving institutions to decide the time-frame, would have possibly been more appropriate.

### - Confidentiality

It has been considered an innate advantage of arbitrations and one of the reasons for selecting this mode to resolve disputes. But the arbitration community has questioned at times is there even a need for it. Parties

can decide if they wish to keep the proceedings confidential. There was no express provision on confidentiality in the Indian statute earlier. The 2019 Amendment has included a blanket provision on confidentiality encompassing the entire arbitral proceedings except for awards where disclosure is necessary for its enforcement. Certain scenarios where disclosure may be necessary have not been taken into consideration and the exceptions suggested by the Committee have been ignored. An absolute confidentiality provision has been inserted, which will go down as an additional flaw.

### - Applicability

The applicability of the 2015 amendments gave rise to a series of conflicting decisions across High Courts. The Supreme Court ruling tried to settle the issue in the Kochi decision<sup>5</sup>. The 2018 Bill overturned the Supreme Court ruling. Several changes were proposed and drafts with suggestions sent to the Ministry to address them to prevent the overturn, but all seem to have fallen on deaf ears. The 2019 amendment has deleted Section 26 from the Act, with an intent for the 2015 amendments to be applicable only to arbitral proceedings commenced on or post 23 October 2015 and court proceedings which emanate from such arbitral proceedings. A change yet again on the applicability is moving towards chaos and uncertainty.

The 2019 Amendments have been recently notified except for the provisions related to the constitution of the Arbitration Council of India. Interestingly, the issue on applicability of 2019 Amendments itself will, in all likelihood, be litigated just as the Supreme Court ruling. However, the issue on applicability of 2019 amendments itself will have to be

clarified. There are one too many complexities and faulty drafting that has led to this complicated arbitration regime, one can only hope that good sense will prevail, and the Supreme Court of India will step in to bring some much-needed clarity.



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<sup>5</sup>Eight Schedule: A person shall not be qualified to be an arbitrator unless he: (A) is an advocate within the meaning of the Advocates Act, 1961 having ten years of practice experience as an Advocate; or (B) is a chartered accountant within the meaning of Chartered Accountants Act, 1949 having ten years of practice experience as a chartered accountant; or (C) is a cost accountant within the meaning of the Cost and Works Accountants Act, 1959 having ten years of experience as a cost accountant; or (D) is a company secretary within the meaning of the Companies Secretaries Act, 1980 having ten years of practice experience as a company secretary; or (E) has been an officer of the Indian Legal Service or (F) has been an officer with law degree having ten years of experience in the legal matters in the government, autonomous body, public sector undertaking or at a senior managerial position in private sector; or (G) has been an officer with engineering degree having ten years of experience as an engineer in the government, autonomous body, public sector undertaking or at a senior level managerial position in a private sector or self-employed; or (H) has been an officer having senior level experience of administration in the Central Government or State Government or having experience of senior level management of a Public Sector Undertaking or a Government company or a private company of repute; (I) is a person, in any other case, having educational qualification at degree level with ten years of experience in scientific or technical stream in the fields of telecom, information technology, intellectual property rights or other specialized areas in the Government, Autonomous Body, Public Sector Undertaking, or a senior level managerial position in a private sector as the case may be.

<sup>6</sup>Board of Cricket Control of India v. Kochi Cricket Private Limited Civil Appeal No. 2879-2880 of 2018



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# Structuring Investments into Africa through Mauritius to Benefit from Investment Treaty Protection

Over the past few decades, through a series of sweeping reforms aimed at fostering a business-friendly legal and regulatory environment, Mauritius has cemented its place as a financial hub and ‘gateway’ to investment in Africa and Asia. During this period, Mauritius has developed a robust network of Double Taxation Agreements (“DTAs”) and investment promotion and protection agreements, otherwise known as bilateral investment treaties (“BITs”). While consideration of the former in tax planning is now a routine step in any cross-border investment transaction, analysis of the latter remains less systematic, and many investors may still be missing out on significant investment protections by forgoing investment structuring under BITs. Particularly in light of increases in capital inflow into Africa, foreign companies – especially those seeking to invest in potentially high-risk markets in Africa and sensitive sectors such as oil & gas and mining (but not limited to these) – should consider structuring their investment to ensure it is covered by an investment treaty. Mauritius is ideally placed in this respect due to its location, its favorable tax regime, and its business-friendly environment.

## I. INVESTMENT STRUCTURING FOR INVESTMENT TREATY PROTECTION GENERALLY

Investment treaties often provide significant protection against unlawful State action (see below), especially for investments in high-risk



jurisdictions and sectors for foreign investments (e.g., energy and mining). Investment structuring, or nationality planning, is the process by which an investor planning an investment in a foreign country evaluates all of the investment treaties of that country to determine which treaties offer the most protection, and structures its investment to secure the greatest protection. This exercise is typically done in conjunction with structuring the investment for tax purposes, and a host State offering both tax efficiency and robust investment treaty protection is selected to channel the investment (usually by incorporating a special-purpose-vehicle).

In May 2019, the Netherlands — traditionally a favored jurisdiction for investment structuring due to its investor-friendly network of investment treaties and its tax appeal — announced a new Model BIT, which arguably excludes special-purpose-vehicles from its scope. The Netherlands already announced that

it would be renegotiating its BITs with certain countries, including Burkina Faso, Nigeria, Tanzania, and Uganda.<sup>1</sup> More are likely to follow. As a result, structuring investments through Mauritius to benefit from Mauritius’s BITs and DTAs is a good alternative to the Netherlands.

## II. STRUCTURING INVESTMENTS TO BENEFIT FROM PROTECTION UNDER MAURITIUS’ BITs

### A. Mauritius’ Strategic Initiative To Become the ‘Gateway’ to Foreign Investment Into Africa

Beginning in the 1990s, Mauritius enacted a series of comprehensive legislative and regulatory reforms designed “to promote Mauritius as a reputed and effective trade and investment platform for the [African] continent.”<sup>2</sup> As part of this initiative to position itself as a hub for foreign investment flows into Africa, Mauritius implemented significant legal reforms and sought to collaborate “with African

<sup>1</sup>Commission Implementing Decisions, European Commission (May 24, 2019), available at <https://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=list&n=10&adv=0&coteld=&year=2019&number=3726&dateFrom=&dateTo=&serviceld=&documentType=&titleLanguage=&titleSearch=EXACT&sortBy=NUMBER&sortOrder=DESC>.

<sup>2</sup>Economic Development Board of Mauritius, *Africa Strategy (2019)*, available at <http://www.edbmauritius.org/africa-strategy/africa-strategy>.



States to leverage on the geostrategic position of Mauritius to drive investment into the continent.”<sup>3</sup>

Specifically, Mauritius created a favorable tax environment for foreign investors by entering into a series of DTAs. To date, Mauritius has entered into DTAs with over 40 countries, including 16 with African countries.<sup>4</sup> Mauritius also passed a series of laws to modernize its legislative and regulatory structures, among them the Investment Promotion Act 2000, Companies Act 2001, Anti Money Laundering Act 2002, Business Facilitation Act 2006, and Financial Services Act 2007.<sup>5</sup>

As a result of these initiatives, Mauritius experienced significant growth in foreign investment flows, particularly in cross-border investment between Mauritius and other African countries. Since 2012 alone, direct investment from Mauritius to Africa increased by 96% to USD 27.9 billion as of June 2018, and investment from Africa to Mauritius increased by 115% during the same period.<sup>6</sup> Mauritius is also now the highest ranked country in the Sub-Saharan African region on the World Economic Forum’s 2019 Global Competitiveness Report, which measures economic productivity and competitiveness, surpassing South Africa.<sup>7</sup>

## B. Mauritius’s Network of BITs

Mauritius also established a strong network of BITs. To date, Mauritius has signed 48 BITs, 28 of which are in force (10 with European countries; 9 with Asian countries and the Middle East; 8 with African countries (Burundi, Congo, Madagascar, Mozambique, Senegal, South Africa, Tanzania, and Zambia); and 1 with Barbados). Mauritius also made it a strategic priority to expand its network of BITs with African countries, as demonstrated by the additional 19 signed BITs awaiting ratification, 17 of which are with African countries.<sup>8</sup>

In terms of substantive protections, Mauritius’s BITs typically guarantee investors fair and equitable treatment, treatment no less favorable than the treatment afforded to investors from any other country, protection against expropriation without adequate compensation, and free repatriation of capital profits. With respect to investor-State dispute settlement issues, while some of Mauritius’s BITs (e.g., Swaziland, Mozambique)<sup>9</sup> arguably limit arbitration to cases involving expropriation and nationalization, all

other Mauritius BITs do not contain such a limitation and commonly provide for arbitration under the auspices of the International Centre for Settlement of Investment Disputes (“ICSID”) and/or ad hoc arbitration under the United Nations Commission on International Trade Law (“UNCITRAL”) Rules).

Mauritius is a member of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”) and has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”).<sup>10</sup>

## C. Investment Structuring: To What Extent Is It Permitted?

### 1. Investment Structuring In Principle Is Permitted

Investment structuring (or restructuring) to benefit from BIT protection in principle is permitted. Tribunals have held that where the definition of investor in the treaty only requires the company to be incorporated or constituted under the laws of the home state to qualify as an investor – as do Mauritius BITs – it was not open to them to add other requirements into the text of the treaty (such as requirements relating to the nationality of the shareholder, ultimate control of the investor, or real business activities in the home state).<sup>11</sup>

### 2. Two Limits to Investment Structuring

#### i. The Text of the BIT Excludes Investment Structuring

Some BITs define a protected “investor” as a legal entity that is not only incorporated in the home State but that also must carry out “real economic activities” in the home State and/or be held or controlled by nationals of the home State. Other BITs contain a “denial of benefits” clause that allows the host State to deny the benefits of the treaty to an entity that is ultimately owned or controlled by nationals of a third State. To our knowledge, most Mauritius BITs do not contain such restrictive definitions of investor,<sup>12</sup> and none contains a denial of benefits clause.

<sup>3</sup>Id.

<sup>4</sup>Economic Development Board of Mauritius, *Double Taxation Avoidance Treaties* (2019), available at <https://www.edbmauritius.org/africa-strategy/double-taxation-agreements/>.

<sup>5</sup>OECD *Investment Policy Reviews: Mauritius 2014*, at 70-74 (June 23, 2014) (“OECD Investment Policy Reviews”), available at [https://read.oecd-ilibrary.org/finance-and-investment/oecd-investment-policy-reviews-mauritius-2014\\_9789264212619-en#page8](https://read.oecd-ilibrary.org/finance-and-investment/oecd-investment-policy-reviews-mauritius-2014_9789264212619-en#page8).

<sup>6</sup>Economic Development Board of Mauritius, *The Mauritius IFC: The Preferred Route for Structuring Investments into Africa* at 5.

<sup>7</sup>World Economic Forum, *The Global Competitiveness Report 2019* at 12 (Oct. 9, 2019), available at [http://www3.weforum.org/docs/WEF\\_TheGlobalCompetitivenessReport2019.pdf](http://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf).

<sup>8</sup>United Nations Conference on Trade and Development (UNCTAD), *International Investment Agreements: Mauritius*, available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/134/mauritius>.

<sup>9</sup>Agreement Between The Government of The Republic of Mauritius and The Government of The Kingdom of Swaziland for the Promotion and Reciprocal Protection of Investments, Art. 8 (not yet ratified); Investment Promotion and Protection Agreement Between The Republic of Mozambique and The Republic of Mauritius, Art. 8 (Feb. 14, 1997).

<sup>10</sup>OECD *Investment Policy Reviews*, supra note 5, at 97.

<sup>11</sup>See the salient case *Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award* (Sept. 7, 2006), 241; and more recently *Renée Rose Levy and Gremcitel SA v. Republic of Peru, ICSID Case No. ARB/11/17, Award* (Jan. 9, 2015), 184, and *Charanne B.V. and Constr. Invs. S.A.R.L. v. Spain, SCC Case No. 062/2012, Award* (Jan. 21, 2016), 417. *The Global Competitiveness Report 2019*, pdf.

<sup>12</sup>But see Mauritius-Switzerland BIT, Art. 1(3) (Nov. 26, 1998) (defining “investors” as “legal entities, including companies, corporations, business associations and other organisations, established under the law of that Contracting Party and having real economic activities in the territory of the same Contracting Party”).

ii. *The Timing of the (Re) structuring*

An investor, however, must consider the timing of any restructuring: some tribunals have refused to extend treaty protection to investments restructured after a dispute between the investor and the host State had already arisen or, in a handful of cases, when such dispute was deemed sufficiently foreseeable by the investor. Tribunals considered that such belated structuring was an “abuse of process” and declined jurisdiction.<sup>13</sup> Investors are therefore advised to structure their investment for BIT protection as early as possible, ideally at the time of making their investment.

In conclusion, foreign investors looking to invest in Africa should consider structuring their investments through Mauritius to take advantage of Mauritius’s network of robust tax and investment treaties, which allow for such structuring.



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<sup>13</sup>*Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (Apr. 15, 2009), 113; *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections (Jun. 1, 2012), 2.96-2.99 (defining foreseeable as “as a very high probability and not merely a possible controversy.”).

# Investor Treaty Obligations And Investor Protection In The Mining Industry

## *The issues and the challenges*

### I. OVERVIEW

#### International Investment Agreements and Concession Agreements

In 2018, global flows of direct foreign aid amounted to U.S. \$1.3 trillion.<sup>1</sup> For many developing countries, foreign investment is critical in making them more competitive.

The main function of an International Investment Agreement ("IIA") between sovereign states is to prescribe how a host state is required to treat foreign investors. IIAs come into being either as a bilateral investment treaty ("BIT"), or as a multilateral investment treaty.

Where a host state grants a mining company a concession agreement, disputes tend to fall into two categories. First, there may be disputes over exploration or exploitation under the terms of the concession agreement. Second, there may be investment disputes over alleged expropriation of the mining company's investment.

Concession agreements typically include dispute resolution clauses that provide for: (1) informal *conciliation* processes or 'cooling off' periods; (2) formal *mediation* with a mediator if informal conciliation fails; and (3) referral to *arbitration*, if the parties are unable to reach a mediated settlement. Such arbitral proceedings, rulings and awards are generally private to the parties concerned.

Where host state measures do not amount to an undisputed breach of a concession agreement, arbitration under the concession agreement itself might not be available.

However, if there is an applicable IIA and state measures are alleged to amount to expropriation of an investment, unfair treatment, unjustified discrimination by government agencies or national courts, government withdrawal of tax exemptions or violation of stabilisation clauses in investment treaties etc., then in such circumstances an investor may have the option of either (i) suing the host state in that state's domestic courts, or (ii) referring the dispute to investment arbitration.

Under most BITs, there will be a provision that enables an investor to refer a dispute to investment arbitration. Interim decisions and awards by investment tribunals are generally published.

### II. ISSUES AND CHALLENGES

Recent investment tribunal cases tend to show four recurrent issues:

- (1) Meaning of "investor"
- (2) Compliance with local law
- (3) Investor protection and state regulation
- (4) Emergence of investor obligations

#### FIRST ISSUE - Meaning of "investor"

Jurisdictional issues often relate to the meaning of "investor" or whether *indirect investments* fall within the definition of "investment" (e.g. shareholding interests and participation in a host state company).

In *South American Silver Limited (Bermuda) v. Bolivia* (2018), Bolivia raised a jurisdictional objection that as the investor was not the direct owner of the shares, the tribunal had no jurisdiction. The objection was dismissed because there was nothing

in the BIT, or any evidence from the time of the negotiation of the BIT, which suggested that the relevant state parties had excluded the possibility of indirect acquisition.

#### SECOND ISSUE - Compliance with local law

In *Bear Creek v. Peru* (2017), the tribunal rejected the argument that as a general rule investment tribunals lack jurisdiction over investments made in violation of domestic law.

However, in *Cortec Mining v. Kenya* (2018), the tribunal ruled that "explicit" language was unnecessary and that investments must be made "*in accordance with the laws of Kenya*" to be afforded protection.<sup>2</sup> The tribunal determined that it did not have jurisdiction because:

- (i) the grant of the relevant mining licence was not a protected investment within the meaning of the applicable BIT, given that the grant did not comply with the laws of Kenya; and
- (ii) there was an *implicit obligation of compliance* with domestic law, as both the ICSID Convention and the relevant BIT protected only "lawful investments".

Consequently, compliance with Kenyan local law *did* go directly to jurisdiction. On the face of it then, the *Bear Creek* decision does not appear readily reconcilable with the *Cortec Mining* decision.

However, the principle of proportionality established in *Kim v. Uzbekistan* may provide some guidance for tribunals as to a principled approach when dealing with the significance of compliance with local law. In *Kim*, the tribunal adopted a three-stage test proportionality principle. First,

<sup>1</sup>UNCTAD World Investment Report 2019, "Key Messages"

<sup>2</sup>See paragraph 333.



it assessed the significance of the obligation allegedly breached by the investor; second, it assessed the seriousness of the investor's conduct; and third, it evaluated whether the legal consequences of such violation were proportionate to the harshness of denying access to protection under the BIT.<sup>3</sup>

The *Cortec v. Kenya* tribunal did in fact apply the *Kim* proportionality principle when it considered whether non-compliance with local law went to jurisdiction; and also affirmed the significance of environmental legislation to the Mrima Hill project, given that location's special environmental vulnerability.<sup>4</sup>

### THIRD ISSUE - Investor protection and state regulation

Recently, some states have placed sustainable development at the centre of national policy.<sup>5</sup> This has led to some renegotiated BITs that are reflective of fundamental policy changes by host states.<sup>6</sup>

However, many older generation BITs remain in force. These BITs tend to contain broadly worded provisions that provide substantive protection for foreign investors whilst not requiring exhaustion of local remedies as a pre-condition for arbitration. The ISDS legal system has attracted strong criticism in recent years.<sup>7</sup>

The conflict between protection for investors and host state regulations tends to be articulated as substantive issues that relate to international investment standards of:

- (i) fair and equitable treatment ("FET") and the protection of investor's legitimate expectations; and
- (ii) indirect expropriation.

In *Crystallex International Corporation v. Venezuela* (2016), a mining investor acquired rights to exploit gold deposits. Later, when the investor sought permits to commence operations, the host state denied the investor an environmental licence owing to concerns about the project's impact on the environment and the indigenous people of the region. Venezuela was found to have unlawfully expropriated the investor's investment by breaching the FET standard: "*FET comprises, inter alia, protection of legitimate expectations, protection against arbitrary and discriminatory treatment, transparency and consistency*".

### FOURTH ISSUE - Emergence of Investor Obligations

Increasingly, host states are bringing counterclaims against investors on grounds of alleged wrongful investor behaviour. Any involvement in corrupt practices may prove fatal to an investor's attempts to protect the investment.

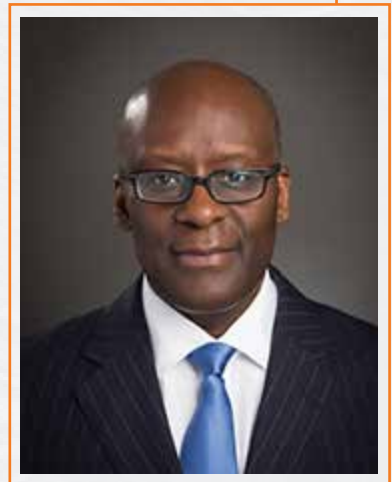
In *Churchill Mining v. Indonesia* (2016), it was held that investors operating in countries with a relatively weak adherence to the rule of law must act with due diligence. Turning a "blind eye" to corrupt practices, as well as participation in such practices, could result in the inadmissibility of an investor's claim, or the loss of access to international arbitration. Churchill's claims were found to be "*based on documents forged to implement a fraud aimed at obtaining mining rights*", and therefore Churchill's claims relative the Government's revocation of its mining licence were ruled inadmissible.<sup>8</sup>

### III. CONCLUSION

Arbitral tribunals in investor-state cases often possess wide powers to interpret the scope and meaning of a host state's obligations under the relevant IIA.

Investor-state arbitrations lack an appellate jurisdiction to promote consistent application of the law. It will therefore tend to fall to individual tribunals to determine, with finality, the extent to which an IIA limits a host state's regulatory powers and the state's ability to adopt and maintain sustainable development policies.

The emergence of investor obligations is a significant development. Where an investor fails to comply with local law, particularly in cases of alleged corruption, the three-stage *Kim* proportionality principle may provide a principled basis on which a tribunal can resolve challenges to jurisdiction.



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<sup>3</sup>See paragraphs 406-408 of the *Kim* decision on Jurisdiction.

<sup>4</sup>See paragraphs 345, 348, 352 and 365 of the Award.

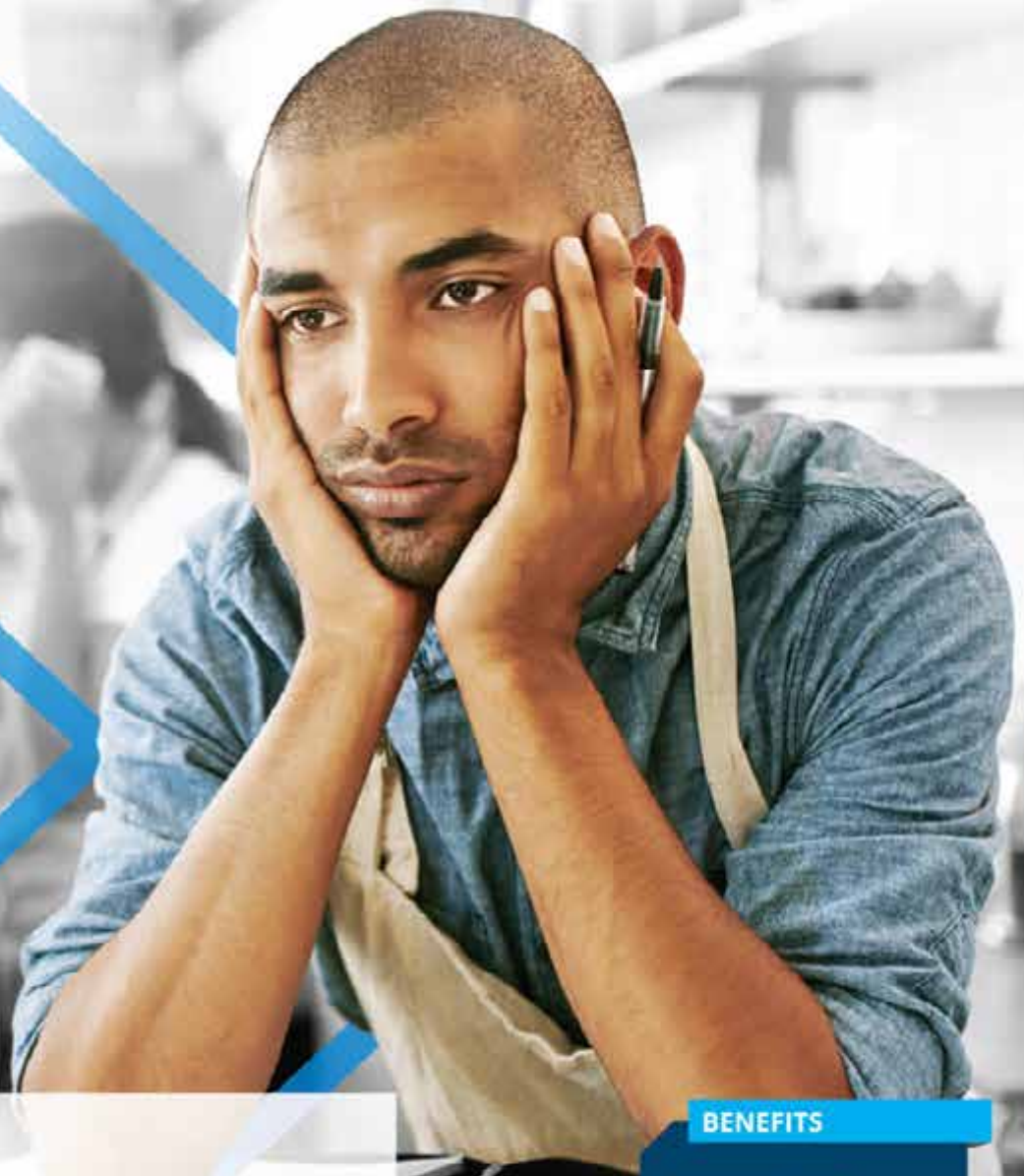
<sup>5</sup>See, for instance, Kenya's Natural Wealth and Resources (Permanent Sovereignty) Act 2017, Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017, Written Laws (Miscellaneous Amendments) Act 2017.

<sup>6</sup>For example, see Tanzania-China (2013) BIT, which provides for limited recourse to investment arbitration. Under Article 12(2), the 2013 BIT gives precedence to the adjudication of investment disputes by the court of the host state. The Tanzanian BIT with the Netherlands that was up for renewal on 1 October 2018 was terminated in September 2018.

<sup>7</sup>UNCTAD *World Report 2017*, Investment and the Digital Economy.

<sup>8</sup>In *Tethyan Copper Company Pty Ltd v. Pakistan* (2019), an ICSID tribunal made an award of nearly US \$6 billion against Pakistan. In 2017, Pakistan had failed on a Decision on Jurisdiction and Liability to establish facts to prove its allegations of corruption against the investor.

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# UNCITRAL Tribunal Analyses French Investor's Laboratory Claim against Mauritius

*(Christian Doutremepuich and Antoine Doutremepuich v The Republic of Mauritius)*



**A**rbitration analysis: Duncan Bagshaw, partner at Howard Kennedy LLP, discusses the significance and importance, for investment treaty arbitration (ITA) practitioners, of a tribunal award on jurisdiction arising out of an arbitration claim against Mauritius where the claimants argued that Mauritius had breached its obligations under a bilateral investment treaty (BIT). The case highlights the trend for international arbitral tribunals to assess more strictly investors' entitlement to claim treaty protections.

*Christian Doutremepuich and Antoine Doutremepuich v The Republic of Mauritius, PCA Case No 2018-37, award on jurisdiction dated 23 August 2019*

## What was the background?

The father-and-son claimants own and operate the Laboratoire d'Hématologie Médico-Légale, in Bordeaux, France, which is a forensic science laboratory. Between 2009–14, the government of Mauritius was in discussions with the claimants with a view of establishing a laboratory in Mauritius to expand the capability and expertise in that field on the island.

In October 2014, the Office of the Prime Minister of Mauritius wrote to the claimants and indicated that there were no objections to the project to establish

a new laboratory in Mauritius. The claimants then formed three companies in Mauritius, each of which they funded with €100,000 in a bank account in Mauritius, with a view to pursuing the project.

Before significant steps were taken to establish the new laboratory, in April 2016 the Board of Investment of Mauritius informed the claimants, without providing reasons, that their updated business plan 'had not been approved' and therefore the companies would not be able to carry on the business of operating the laboratory.

The claimants brought an arbitration claim against Mauritius, arguing that the conduct of Mauritius breached its obligations under the France-Mauritius BIT, and that the claimants were investors within the meaning of the BIT.

The tribunal consisted of well-known arbitrators, Professor Olivier Caprasse (nominated by the claimants), Professor Jan Paulsson (nominated by Mauritius), and Professor Maxi Scherer (as presiding arbitrator). All were well qualified to deal with the case, particularly because the arbitration was conducted in both English and French, without translation.



Mauritius argued that the tribunal had no jurisdiction to decide the claim, the tribunal decided to hear and resolve that issue as a preliminary matter.

### What did the tribunal decide on jurisdiction?

The claimants argued that, although the BIT contained no provision which allowed an investor to bring an arbitration claim against the state, they could take advantage of the most favoured nation (MFN) clause to import the arbitration provision from the Mauritius-Finland BIT. Mauritius argued that that was not possible in this case because:

- Mauritius had not consented to arbitration at all, and consent could not be attributed to Mauritius by reference to another treaty, and
- in any event, the MFN clause did not permit a party to the BIT to import investment treaty arbitration provisions from other treaties

Separately, Mauritius argued that the claimants had not made an investment in Mauritius which would qualify them for protection under the BIT.

### - Issue one: consent to arbitration

The tribunal was required to consider arguments which have become quite familiar in investment treaty arbitration cases, in which a claimant seeks to rely on an MFN clause to import an arbitration provision into a treaty with no such express provision in the text.

The tribunal reviewed the familiar case law on this subject, particularly the decisions of tribunals on similar issues. The respondent referred to cases such as *Venezuela US, S.R.L. v Venezuela*, PCA Case No 2013-34, and *Hochtief AG v Argentina*, ICSID Case No ARB/07/31, and *Salini Construttori v Jordan*, ICSID Case No ARB/02/13, in which the tribunals held that generally, a MFN clause could not be relied upon to go to arbitration where the treaty between the state of the investor and

the respondent contains no provision for disputes between them to go to arbitration at all. The claimants stressed the decisions which appear to go the other way, such as *Maffezini v Spain*, ICSID Case No ARB/97/7 and *Siemens v Argentina*, ICSID Case No ARB/02/8.

The tribunal's approach was to avoid simplistic generalisations, and to focus on the particular case in front of it, to reach a decision on the terms of the treaty at hand. Therefore, it found 'there is no general rule that MFN clauses always, or never, apply to dispute resolution'. Instead, the question was whether the parties to this particular treaty intended that the particular MFN clause which they had agreed could be used in such a way.

In this case, construing the text of the treaty in accordance with the Vienna Convention, the tribunal's answer was that it could not be so used. This was because:

- consent to arbitration must be clearly expressed, and whereas here there was no agreement in the BIT to arbitrate claims brought by investors for breach of the treaty, the consent to arbitrator could not be found in the form of the MFN and the fact that Mauritius had agreed to arbitration of investor-state disputes in other treaties
- the principle of *ejusdem generis* means that the MFN cannot import a provision into a treaty which relates to a matter which is not regulated at all by the treaty into which it is sought to import it. The BIT did not regulate investor-state arbitration of disputes, and so no provision could be imported to do so
- the wording of this particular MFN clause made it clear that it required Mauritius to treat investors from France no less favourably than investors from other countries, '*pour les matières régies par la présente Convention*' ('... for matters governed by this treaty'). Since arbitration of

investor-state claims under the treaty was not governed by the BIT, provisions on that matter could not be imported

### Issue two: was there an investment?

Like most BITs, the BIT required each party to provide certain protections to persons who had made investments in its territory. The definition of investment, in common with many treaties, provided that it included all assets, including but not limited to various examples of assets, such as real property, shares in a company, trademarks and patents, etc.

Here, the claimants undoubtedly did own assets of a type which was included in the non-exhaustive list of assets included in the definition of an investment. However, the parties agreed, and the tribunal accepted, that even where the claimant owns an asset in the territory included in the list, the investment would also need to meet the test for 'an investment' set out in *Salini Construttori v Jordan*. This requires that an investment must represent a contribution to the host state, must be of a certain duration, and must entail a participation in the risks of the operation.

While this was an agreed approach between the parties, reflecting modern international law, it does raise a rather odd scenario in which the treaty lists assets which are included in the express definition of investments in the treaty, but which may not in fact have the quality of investments within the true meaning of that word.

This seems surprising, on a simple analysis if the definition of an investment includes shares in a company, it might be said to be stretching the words of the treaty to require that an investor holding shares in a company must also have made an investment of a certain character and duration before it qualifies as an investment. One might have thought that the drafters of the BIT might have intended the inclusion of the non-exhaustive list to avoid argument as to whether a party holding an asset

included in the list held a qualifying 'investment'.

It is a little like an agreement saying, 'The definition of a horse includes ... a donkey', but in a particular case, a donkey being held not to satisfy the express definition because it does not look enough like a horse.

On analysis, and on the facts the tribunal concluded that the claimants' activities did not amount to an investment at all, since they had not committed substantial sums or assets, and had taken no real risk.

### **Why is this decision of interest to ITA practitioners?**

This decision, and the jurisprudence which it reflects, is of great importance to ITA practitioners. It demonstrates that, in modern investment treaty arbitration law, the assessment of whether a potential claimant is a qualifying investor involves more than simply identifying whether the investor held a relevant asset, as identified in the treaty within the definition of investment. A qualitative assessment of the nature of the claimant's investment, and how and when it was made, is also required.

Where an investor has not committed significant assets, or taken any real risks, a tribunal may find that there was no relevant investment even though the claimant held an asset in the host state in a class identified as 'an investment'. As the French artist, Jean-Michel René Souche reputedly said, 'You cannot turn a donkey into a thoroughbred'.

Arguably this decision represents part of a trend for international arbitration tribunals to assess more stringently the entitlement of investors to claim treaty protections. This trend can mean that a claimant must show that they justify the protection of the treaty rather than that they merely qualify in a simple, technical way as an investor under its terms. This may reflect a sense that investment treaty arbitration should not be used as a way for 'investors' to secure windfalls without ever having taken any risk or truly engaged at all. This probably follows from a desire of tribunals to demonstrate the legitimacy and fairness of the investment treaty arbitration system to respondent states.

The decision also demonstrates that MFN clauses should be approached with caution, even when widely drafted. The expression 'most favoured nation' is apt to mislead. On the interpretation of the clause adopted by

this tribunal (an approach other tribunals have agreed with), MFN clauses really only mean that the investor will be treated no less favourably than investors from other states in connection with the matters governed by the treaty made by the investor's state, and not generally as if they came from the nation most favoured by the host state in every respect.

In other words, investors from a state with a BIT with an MFN clause cannot be sure that they can demand exactly as favourable treatment as investors from another state with a more favourable treaty. Investors can only be confident that the terms of their BIT will be read as if they were as favourable as the term in another BIT dealing with the same subject matter. If their own BIT says nothing on the issue, and there is no referable term, they cannot demand the protection provided to investors from another state.

*Interviewed by Susan Ghaiwal.*

*This article was first published in LexisNexis PSL.*



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# A “Done Deal” For States And Investors?

## *The new United Nations Convention on International Settlement Agreements Resulting from Mediation*

“

The issue of finality goes well beyond the search for certainty and is particularly important in commerce and finance, as they are per definition transactional and dependent on payment.<sup>1</sup>

”

Jan Dalhuisen

“

“Finality, Sir, is not the language of politics.”<sup>2</sup>

”

Benjamin Disraeli

**I**t has been said that one of the great strengths of international arbitration is finality. With the expected adoption of the Draft UNCITRAL Convention on International Settlement Agreements Resulting from Mediation (“Singapore Convention”)³ and amendments to the UNCITRAL Model Law on International Commercial Conciliation States will have the opportunity to support increased use of amicable negotiation/mediation to preserve commercial relations where possible and otherwise resolve disputes arising therefrom with finality in a process which reserves decision-making to the parties and allows flexibility of both process and outcomes.

This article is intended to address the rationale for and highlights of the Singapore Convention. It will also examine the risks and benefits to both commercial interests and public

entities and, in particular, examine the possible application of the Singapore Convention to Investor-State relations.

Importantly, the Singapore Convention provides a major step forward for international trade law in using the term “mediation”, as opposed to “conciliation”. The international acceptance and increased use of mediation can hardly be overstated. In 2017, parties from 31 countries and independent territories filed mediations with the ICC International Center for ADR.<sup>4</sup> The International Centre for Dispute Resolution (ICDR-AAA) administered 128 international mediations in 2017. In both common and civil law jurisdictions mediation has become part of the standard commercial dispute resolution procedure, with many States now requiring disputing parties to consider or use mediation before proceeding with more formal court proceedings.

### I. THE CASE FOR UNIFORMITY

The Singapore Convention drafters saw value in a mediation settlement framework applicable in diverse legal and economic cultures. And indeed, it appears that the status of mediated agreements changes depending on the jurisdiction. By way of example, it is a commonly held perception in the United States and the United Kingdom that mediated agreements requiring future performance are enforceable only by way of separate action for breach of contract. As such, mediated settlement agreements would be susceptible to set aside based on all the traditional defences to enforcement including the absence of agreement on essential terms, fraud, duress, mistake, incapacity or lack of authority. That said, one commentator has noted more favourable treatment in the United States, suggesting that the broad public policy support for negotiated settlements has enhanced the enforceability of

<sup>1</sup>Dalhuisen, Jan *Opinio Juris* 4 April 2012.

<sup>2</sup>Disraeli, Benjamin Letter to his father from Malta (25 August 1830), cited in Lord Beaconsfield's Letters, 1830-1852 (1882), p. 32.

<sup>3</sup>Singapore Convention Text: United Nations Commission on International Trade Law, Fifty-first Session, New York, 25 June-13 July 2018 A/73/17, Annex I. The Singapore Convention was adopted by the United Nations on 20 December, 2018, General Assembly Resolution 73, 198.

<sup>4</sup>ICC *Dispute Resolution Bulletin* 2018 – Issue 2; Samaa Haridi and Julien Fouret Eds. p. 64.<sup>5</sup>Sussman, E. and Weiner, C., Striving for the “Bullet-Proof” Mediation Settlement Agreement. *NYSBA New York Dispute Resolution Lawyer*, Spring 2015, Vol. 8. No. 1, p. 22



mediated settlements, likening them to “super contracts”<sup>5</sup> and noting Court’s reluctance to set them aside, particularly in commercial disputes where the parties have received competent legal counsel. More friendly treatment of mediated settlements can be found in some civil law jurisdictions. In France and Italy, by way of example, simplified procedures for the enforcement of mediated agreements are provided by statute.<sup>6</sup> Notwithstanding the favourable treatment of mediated settlements in some common and civil law jurisdictions, the absence of an effective global enforcement mechanism mitigates against mediation’s use in transnational contracts, enabling those who argue mediation only delays the inevitable hearing before a decision-making judge or arbitrator. This absence of certainty may have been what motivated attendees at a recent global series of dispute settlement stakeholder conferences to register the absence of an effective enforcement mechanism for settlements as a major concern.<sup>7</sup>

## II. THE SINGAPORE CONVENTION

The Preamble to the Singapore Convention provides a brief but effective rationale for its consideration and adoption. The Preamble notes increased use of mediation as an alternative to litigation, references the significant benefits of mediation including the opportunity to preserve commercial relations and enable savings by States in the administration of justice and welcomes the opportunity to bring a common framework to the judicial management of mediation settlements “that is acceptable to States with different legal, social and economic systems...”<sup>8</sup>

The Singapore Convention adopts

a simple, modern reference to mediation, i.e. “a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably”.<sup>9</sup> The Definitions section adds a further requirement, noting the mediator must “lack the authority to impose a solution upon the parties to the dispute”.<sup>10</sup>

“In Annotations to the Singapore Convention the drafters note “in its previously adopted texts and relevant documents, UNCITRAL used the term ‘conciliation’ with the understanding that the terms “conciliation” and ‘mediation’ were interchangeable.”

The text goes on to say that “this change in terminology “does not have any substantive or conceptual implications”.<sup>11</sup> That said, it should be noted that in some legal cultures and commercial practice, “conciliation” has been understood and practiced as a more formal, quasi-adjudicative process where the neutral conciliator is expected to issue written recommendations for settlement as part of the remit (for example see the ICSID Conciliation Rules). While modern definitions of mediation would allow for a “mediator’s recommendation” as a procedural choice in mediation, common practice is to avoid doing so except when requested and only as a final attempt to bring the parties to an amicable settlement.

## III. SCOPE

Perhaps it should go without saying that a United Nations Convention prepared by the UN Commission on International Trade Law is intended to apply to commercial disputes. That said, the Singapore Convention specifically excludes its application to settlement agreements reached

in consumer, family, inheritance or employment matters.<sup>12</sup>

The Singapore Convention goes further, requiring a settlement agreement recorded in writing (which includes electronic communications)<sup>13</sup> to resolve a dispute which is international in nature. The international element is satisfied in either of two ways; parties from separate States or the places where the parties have their places of business is different from the place of performance or the place where the subject matter of the agreement is most closely connected.<sup>14</sup>

Finally, as regarding scope, the drafters went to some trouble to avoid confusing the application of the Singapore Convention to settlement agreements otherwise enforceable by State courts or agreements recorded and enforceable as arbitration awards (“consent awards”).<sup>15</sup>

## IV. SINGAPORE CONVENTION IN PRACTICE

Parties to the Singapore Convention are required to enforce settlement agreements resulting from mediation in accordance with their own procedural rules and the conditions applied by the Singapore Convention.<sup>16</sup> Similarly, Parties to the Singapore Convention will allow a disputant to invoke a settlement agreement reached in mediation in order to prove a matter has been previously resolved.<sup>17</sup>

In order to rely on the settlement agreement parties need only produce a copy of the settlement agreement and provide evidence that the settlement agreement resulted from mediation.<sup>18</sup> The Singapore Convention doesn’t spell out any particular evidentiary requirements, instead providing

<sup>5</sup>Sussman, E. and Weiner, C., *Striving for the “Bullet-Proof” Mediation Settlement Agreement*, *NYSBA New York Dispute Resolution Lawyer*, Spring 2015, Vol. 8. No. 1, p. 22

<sup>6</sup>France – Code of Civil Procedure Articles 1565, 1566 and 1567; Italy - Legislative Decree 28/2010, art. 12.

<sup>7</sup>Attendees at the 2016-2017 Global Pound Conference Events included “the use of legislation or conventions that promote recognition and enforcement of settlements, including those reached in mediation” among their top needs. Information regarding the Global Pound Conference is available at <https://www.globalpound.org>

<sup>8</sup>Singapore Convention Text; A/CN.9/942, p. 3.

<sup>9</sup>Singapore Convention Text; Ibid p. 2.

<sup>10</sup>Singapore Convention Text; Ibid p. 4.

<sup>11</sup>Singapore Convention Text; Ibid p. 9.

<sup>12</sup>Singapore Convention Text; Ibid p. 3.

<sup>13</sup>Singapore Convention Text; Ibid p. 3-4.

<sup>14</sup>Singapore Convention Text; Ibid p. 3.

<sup>15</sup>Singapore Convention Text; Ibid p. 3.

<sup>16</sup>Singapore Convention Text; Ibid p. 3.

examples of evidence that might be found satisfactory. Examples provided include a mediator's signature on the settlement agreement, a document signed by the mediator indicating that the mediation was carried out or an attestation by an administering institution.<sup>19</sup> In considering applications for relief, competent authorities "shall act expeditiously."<sup>20</sup> While "make it simple and fast" seems to be the message to enforcing entities, it is equally clear that bringing mediated settlements into the realm of enforcement creates a need for additional detail and review. At least early on disputants intending to rely on mediated settlements will do well to have the added protection afforded by an administering institution.

The Singapore Convention also provides grounds for refusing to grant relief. Standards for refusal include issues with the settlement agreement (e.g. void, inoperable, impossible to perform, not final or binding in accordance with its terms, has been modified or performed or lacks clarity), the mediator (e.g. serious breach of conduct by the mediator, lack of independence and impartiality) or a finding by the enforcing authority that granting the relief sought would be contrary to public policy or the subject matter of the dispute is not capable of settlement by mediation.<sup>21</sup>

## V. A CHOICE FOR STATES

Two Reservation options are prescribed for adopting States. The future of Investor-State mediation may well be determined in their choice and application.

The first option provides that the Convention will not apply to mediated settlement agreements to which a State, government agency or any person acting on behalf of a

government agency is a party, to the extent specified in the declaration.<sup>22</sup>

The second option is an intriguing one, preserving but not requiring application of the Convention to the State. Signing on to this Reservation, the Convention will apply "only to the extent that the parties to the settlement agreement have agreed to the application of the Convention."<sup>23</sup>

Reservations may be made at any time, though Reservations made or withdrawn after entry into force of the Convention will become effective six months after deposit with UNCITRAL.

## VI. INVESTOR-STATE DISPUTE SETTLEMENT

### Obstacles And Solutions

A uniform and efficient method for enforcing international commercial agreements reached in mediation will be welcomed by the global business community, but what about States?

The conventional wisdom is that "States don't settle (their disputes)". Or do they? Statistics maintained by the International Center for the Settlement of Investment Disputes (ICSID) claim that one-third of the cases filed at ICSID in 2017 were either settled or withdrawn.<sup>24</sup> Those statistics need more analysis, but it would seem that Investor-State (IS) cases do settle.

And, if that is the case, the benefits of mediated negotiations are also worthy of exploration.

Experts focused on reform of the IS dispute settlement system have been suggesting an IS mediation option for years.<sup>25</sup> Benefits including early resolution, preservation of economic relationships, preserving the investment friendly image of a State by providing the investor with alternatives to litigation, flexibility of process and remedies and the ability to energize the negotiation process by bringing in one or more skilled mediators have been touted as reasons for embracing mediation.<sup>26</sup>

Notwithstanding the salutary benefits noted above IS dispute resolution experts have identified challenges to negotiating IS disputes. In 2016, the Centre for International Law of the National University of Singapore ("CIL") conducted a survey of experienced IS arbitration professionals focused on obstacles to settlement in IS disputes.<sup>27</sup> While the sample size was small (97 correspondents and 47 responses) the results were both indicative of perceived obstacles to the settlement of IS disputes and provide a useful means of assessing both obstacles to settlement and possible solutions.

CIL provided correspondents with a list of 29 possible obstacles to settlement, asking them to rank-

“Mediation can also complement the arbitration process in IS dispute settlement machinery.”

<sup>17</sup>Singapore Convention Text; Ibid p. 3.

<sup>18</sup>Singapore Convention Text; Ibid p. 4.

<sup>19</sup>Singapore Convention Text; Ibid p. 9.

<sup>20</sup>Singapore Convention Text; Ibid p. 5.

<sup>21</sup>Singapore Convention Text; Ibid p. 5.

<sup>22</sup>Singapore Convention Text; Ibid p. 6.

<sup>23</sup>Singapore Convention Text; Ibid p. 6.

<sup>24</sup>See 2017 ICSID Statistics for cases settled or otherwise discontinued at [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf).

<sup>25</sup>Coe, Jack J. Jr., *Toward a Complimentary Role for Conciliation in Investor-State Disputes – A Preliminary Sketch* (2005) 12 *University of California Davis Journal of International Law and Policy* 7.

<sup>26</sup>See IMI Investor State Mediation Taskforce Submission to the EU Commission at file:///C:/Users/Mark/Downloads/ISM-Task-Force-response-to-EU-Commission-July-2014%20(2).pdf.

order obstacles in terms of their deterrence to settlement. Among the listed obstacles “the desire to defer responsibility for decision-making to a third party” was ranked number 1. That approach has been described to the author as a lack of political will but, to be fair, the “not on my watch”, delay the day of judgement approach isn’t unique to government. Corporate executives occasionally act similarly, preferring to leave the bad news to their successor.

Key findings in the CIL Survey include a note that the significant majority of respondents believed the State is the party more reluctant to settle. What sets States apart is, of course, public perception and politics. Number 3 among the ranked obstacles to settlement was “fear of criticism”. In the world of politics criticism can result in loss of support or worse. Indeed, perhaps the worst-case scenario in the rough and tumble of politics is the potential for associating the settlement of a case with favours granted the opposing party and resulting allegations or charges of corruption (CIL rank-order obstacle number 7).

By way of solutions, States might consider taking a page from their corporate colleagues’ strategy in defraying criticism. Multi-national companies in particular frequently have policies in place supporting the use of mediation and other non-adversarial alternatives to litigation. The existence of a policy provides both an answer of sorts to internal critics and an answer to adversaries who mistake willingness to negotiate for weakness. Several States in both developed and developing economies have already taken the lead in welcoming mediation in IS relations.<sup>28</sup> Global NGOs are also providing educational leadership aimed at assisting the “normalisation” of mediation at the State level.<sup>29</sup>

If anything, there is an even more compelling argument for government’s use of mediation. Sovereignty, long a watch word for government, isn’t surrendered in mediation (as it is for example in arbitration) as both the process and outcome require the parties’ agreement. What should be even more attractive to States is

Mediation can also complement the arbitration process in IS dispute settlement machinery. While traditional thinking is that the so-called “cooling off” period is the perfect time to mediate, mediation can take place at any time during the pendency of an IS arbitration, presenting the parties with multiple chances to exit the



the range of remedies available for settlement. Largely unconstrained by contract or law, parties to a mediated settlement can tear up the contract, resolving the matter in terms of current political and economic needs. A further important benefit for States is that third parties, not party to the original contract can participate in the mediation. This allows community groups, NGOs or others critical to the legitimacy of a settlement agreement to take part in the process where appropriate and with party agreement. Mediation can be accessed at any point in the relationship. So, for example, an investor and a State can use mediation to address existing problems during the course of a long-term project, preserving contractual relations and preventing problems from escalating into full blown disputes.

third-party decision-making process as they find out more about the case and explore their respective needs and interests. Mediation might also be used to resolve important elements of a dispute, while perhaps leaving technical matters such as pricing formulas to be resolved by arbitration. Mediation can even be accessed after an Award has been entered, with parties possibly avoiding a nullification panel and enforcement proceedings in favour of a negotiated solution.

Skilled mediators can also aid the acceptance of the negotiated agreement. In the first instance, mediators can facilitate the negotiation of media and information protocols, allowing for the transparency required in the public arena while preserving confidentiality of the mediated negotiations where necessary. In

<sup>27</sup>Seraphina Chew, Lucy Reed and J Christopher Thomas QC, ‘Report: Survey on Obstacles to Settlement of Investor-State Disputes’ (NUS Centre for International Law Working Paper Series 2017/001, June 2017) <https://cil.nus.edu.sg/publication/survey-on-obstacles-to-settlement-of-investor-states-disputes>.

<sup>28</sup>See Comprehensive Economic and Trade Agreement Between Canada and the European Union (CETA) at <http://data.consilium.europa.eu/doc/document/ST-10973-2016-ADD-5/en/pdf#page=38>; see also Prevention of Disputes arising in relation to WTO Agreements, Free Trade Agreements and International Investment Agreements, Dominican Republic Decree 303-15, 1 October 2015.

<sup>29</sup>The International Bar Association published a set of IS Mediation Rules in 2012. The Energy Charter Secretariat, working with the International Mediation Institute (IMI), developed a Guide on Mediation in 2016; IMI published competency criteria for IS mediators to assist the selection of mediators in IS disputes, also in 2016; ICSID, the Energy Charter Secretariat, UNCITRAL, IMI and the Centre for Effective Dispute Resolution (CEDR) have cooperatively carried out a series of educational programmes and IS mediator skills training programmes on several continents over the last several years. See at [https://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Mediation/State\\_Mediation/Default.aspx](https://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/State_Mediation/Default.aspx); [https://energycharter.org/fileadmin/Documents\\_Media/CCDECS/2016/CCDEC201612.pdf](https://energycharter.org/fileadmin/Documents_Media/CCDECS/2016/CCDEC201612.pdf); [file:///C:/Users/Mark/Downloads/Investor-State-Mediation-Competency-Criteria%20\(3\).pdf](file:///C:/Users/Mark/Downloads/Investor-State-Mediation-Competency-Criteria%20(3).pdf); <https://icsid.worldbank.org/en/Pages/process/adr-mechanisms--mediation.aspx>; [www.cedr.com/blog/investor-state-mediation-training/](http://www.cedr.com/blog/investor-state-mediation-training/).



complex, multi-party negotiations involving community or other third party interests a second mediator ("co-mediation") can be engaged at the outset to both divide the workload and ease the addressing of cultural, linguistic or technical issues.<sup>30</sup> As mentioned earlier, drafters of the Singapore Convention acknowledged the legitimacy issue in recognising the value of a mediator's signature on the agreement or an attestation from an administering authority. In public sector mediation it would not be unusual for the mediator to do more, providing an attestation that the parties were well represented and bargained diligently in respect of their individual interests. This "vouching" process<sup>31</sup> can provide useful and even necessary re-assurance for both investor and state watchdogs.

A more surprising concern identified at various educational fora and supported by the CIL survey is the absence, in many States, of a State protocol for managing IS disputes. It seems simple, but the absence of policy and protocols leads to multiple problems including who speaks for the State, who coordinates the various and perhaps disparate interests of separate State ministries (CIL obstacle 6), how IS disputes are budgeted (CIL obstacle 4) and paid for, how and when legal counsel are

engaged and even who pays the mediator. Putting a single ministry in charge makes sense, not simply for coordination purposes but particularly given the value of developing expertise in claims management and resolution. As easy as that sounds it may run afoul of current practice, where the ministry managing a particular project is more likely to maintain control when problems arise.<sup>32</sup>

Again, and thankfully, NGOs have taken leadership on developing guidelines for States who are looking for a model framework to manage IS disputes. The Energy Charter Secretariat, working in conjunction with the International Mediation Institute's Investor State Mediation Taskforce, is in the midst of developing a model IS dispute management

instrument for State use.

Returning to the Singapore Convention, States are presented with two choices in terms of reservations. The first would eliminate the application of the Convention to the signatory State, its various entities and representatives, *to the extent specified in the declaration* (emphasis added). Hopefully, adopting States will use this reservation not to eliminate the application of the Convention to the State but rather to limit which agency or individual can speak for the State. This option can provide States that have a developed conflict management protocol with the opportunity to bring both State expertise to the IS dispute settlement process and clarity to contracting parties who might otherwise wonder who they can negotiate with.

The second option ("plan b" if you will) would allow the application of the Convention on a case-by-case basis, with the approval of the State required at the time of the particular settlement agreement. This would provide additional flexibility to the State, allowing the state to offer finality as part of a settlement offer where the return to the State, political needs and economic interests justifies giving the investor the added insurance of an enforceable settlement, but withholding that agreement otherwise. In the hands of skilled State negotiators "plan b" can provide the State with a powerful new bargaining chip, an offer of finality to the investor.

Even with reasonable reservations, a State wishing to attract inward investment would provide real assurance to potential investors by allowing itself to become part of an efficient and effective regime for IS conflict management.

So, is widespread adoption of the Singapore Convention a sure thing, a "done deal"? Time will tell.

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<sup>30</sup>Coe, Jack J. Jr., Concurrent Co-Mediation – Toward a More Collaborative Center of Gravity in Investor-State Dispute Resolution; forthcoming in Catharine Titi and Katia Fach Gómez Eds. *Mediation in International Commercial and Investment Disputes*, Oxford University Press, 2019.

<sup>31</sup>Coe, Jack J. Jr., Concurrent Co-Mediation – Toward a More Collaborative Center of Gravity in Investor-State Dispute Resolution; *Ibid.*

<sup>32</sup>Legum, Bart, The Difficulties of Conciliation in Investment Treaty Cases: A Comment on Professor Jack C. Coe's "Toward a Complimentary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch," *Mealy's International Arbitration Report*, April 2006.



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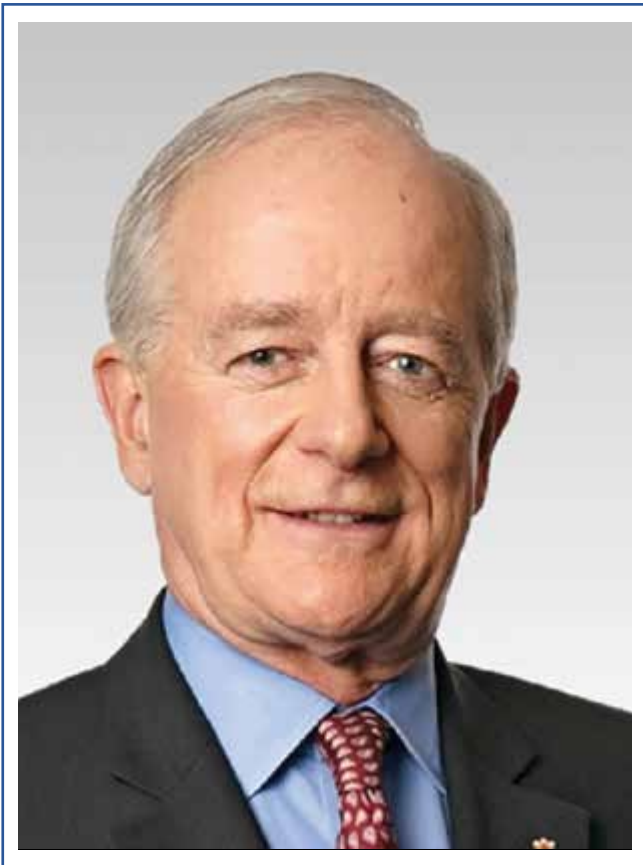


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## Interview

### Hon. Yves Fortier

*PC, CC, OQ, QC, Ad. E., LLD*

Member of the MARC Court;  
International Arbitrator

*20 Essex Street, United Kingdom,  
Cabinet Yves Fortier, Canada*

“

I have no doubt that the MARC  
will grow and prosper into a  
world class arbitration venue

”

The Honorable L. Yves Fortier is recognized as one of world's best and most sought-after international arbitrator. He started his career as a lawyer with Ogilvy Renault in Montréal, where he practiced for more than half a century. As a lawyer, Mr. Fortier has litigated important cases both in Canada and internationally, on a wide range of subjects such as commercial law, competition law, tax law, bankruptcy cases. He left Ogilvy Renault (now Norton Rose Fulbright) in 2011 to establish a solo arbitration practice. Since 1 January 2012, he has been a sole arbitration practitioner with offices in Montreal, Toronto and London. In the past 30 years, he has served as Chairman or party-appointed arbitrator on more than 200 international arbitral tribunals, either ad hoc or constituted by different arbitral institutions. He has also served as Judge ad hoc of the International Court of Justice in The Hague. He is a past President of the Canadian Bar Association and of the London Court of International Arbitration. Mr. Fortier has also served as a member of the Permanent Court of Arbitration in the Hague.

From July 1988 until February 1992, Mr. Fortier took leave from his law practice to take up an appointment as Canada's Ambassador and Permanent Representative to the United Nations in New York. He was also Canada's representative on the UN Security Council and President of the Security Council in 1989.

In 2012, Mr. Fortier was appointed chair of the World Bank Group's Sanctions Board which combats corruption and fraud in projects financed by the World Bank. In 2016, he was appointed Chair of the EBRD (Enforcement Committee of the European Bank for Reconstruction and Development).

In 2013, Mr. Fortier was appointed to the Security and Intelligence Review Committee of Canada and sworn in as a member of the Privy Council of Canada.

Earlier this year, the MARC Team was delighted to learn that Mr. Fortier had accepted to join the MARC Court, further to an invitation made to him by Mr. Kaplan, President of the MARC Court.

In the context of his recent appointment as member of the MARC Court, the MARC Team is pleased to bring to you a short interview of Mr. Fortier, during which he revisits key milestones of his career, shares his insights on arbitration practice, his views on geopolitics, as well as his passions in life.

*Honorable Yves Fortier, you have an impressive career track record: Canadian diplomat, trial and appellate lawyer, arbitrator and corporate director. You have been described as 'one of the four or five international arbitrators who are most in demand in the world'. According to Brian Mulroney, former Prime Minister of Canada, you are considered one of the top three courtroom lawyers in Canada. If you were to look back at those rich years as a professional, what are the most important lessons that you have derived from them and which you would want to pass on to others?*

Let me say at the outset that I am very humbled by your question. I have been very fortunate to be at the right place at the right time. I learned, early in my life, that intellectual curiosity was paramount, and that hard work



would be rewarded. Curiosity made me discover a myriad of treasures which lead me to learn so much about life. As for hard work, it has never killed anyone. I have been privileged to work throughout my life with exceptionally kind and generous men and women. I have learned from all of them.

*Mauritius is a small dot on the world map, thousands of miles away from your homeland, Canada. What prompted you to accept MARC's invitation to become a member of its Court? And what are your views about its prospects to grow into a world class arbitration venue?*

That is an easy question to answer and it follows from the closing sentence in my first answer. My friend, Neil Kaplan, a man I have always admired and respected invited me. I accepted his kind invitation. I have no doubt that the MARC will grow and prosper into a world class arbitration venue.

*As an international arbitrator, what do you expect (1) from an institutional arbitration center administering the proceedings of an international arbitration (2) from parties' counsel?*

The arbitral institution must provide a pleasant and comfortable environment for members of the arbitral tribunal in order to allow the arbitrator(s) to discharge their awesome remit and concentrate on their duties as adjudicators. Lawyers representing the disputing parties are well advised to respect one another, be polite in their exchanges with opposing counsel and do all they can in order to present their respective cases to the tribunal in a comprehensive way.

*You were the presiding member of the arbitration panel in the Yukos arbitration, which resulted in the largest award ever made by an international arbitration panel – a USD 50 billion award awarded to shareholders of a Russian energy company against the government of Russia. What insights or advice would you like to share with fellow arbitrators about handling the tremendous duties, powers, responsibilities and challenges associated with such a massive case, and with arbitration practice in general?*

Yes, the Yukos arbitration was massive on all counts. However, as it is still the subject of annulment proceedings in Dutch Courts, I prefer not to answer your question.

*Investment arbitration has recently attracted considerable criticism, such as lack of transparency, length and costs of proceedings, conflict of interest. What according to you are the guiding principles and strengths of investment arbitration which must be upheld as pillars if this form of dispute resolution must continue to remain a viable solution to investment disputes and a trusted form of trade facilitation?*

On 19 October, at the American University Washington College of Law, I delivered a lecture on that very topic. I will be happy to provide you and your readers with the link to my lecture when it is published.

*In the context of your experience as Canadian Ambassador to the United Nations, what do you consider today to be the most important geopolitical and economic challenges and imperatives which nations of our world must address?*

I served as Canada's Ambassador to the United Nations nearly 30 years ago. I was very fortunate as those were the golden years of the UN: the collapse of the Berlin wall, the disintegration of the Soviet Union, the release of Nelson Mandela, the Gulf war, etc. I have remained very interested in all events on the geopolitical stage. I am concerned today with events in the Middle East and in South East Asia, as well as the persistent trade dispute between China and the USA. Where are the Churchill, the Roosevelt and the de Gaulle today?

*What are your passions in life besides law? Who is your favorite author/artist/ composer? What is your favorite sport?*

"Mens sana in corpora sano". Until a few years ago when I fell and severed one of my quadriceps, I was a very active tennis player and skier. Today, I exercise in a gym and follow Pilates courses. I have always loved reading and opera. But first and foremost, I enjoy the company of Carol, my wife of 60 years, our three wonderful children and our eight grand-children!

Interviewed by:



**Anjana KHEMRAZ-CHIKHURI**

Deputy Registrar

*MARC*

*Mauritius*



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## Interview Dipna Gunnoo

Barrister-at-law/ *Avocat à la Cour*  
Head of MARC  
*Mauritius*



MARC is a premier dispute  
resolution center managing cases  
in English & French



**T**he Mauritius Chamber of Commerce and Industry (MCCI) Arbitration and Mediation Center (MARC) is led by Paris and Mauritius admitted lawyer, Dipna Gunnoo. MARC was established by the MCCI in 1996 based on the model of the International Court of Arbitration of the International Chamber of Commerce in Paris. In 2017, MARC unveiled its new structure, including a governance structure based on the highest standards of governance and best practices as well as the MARC Court<sup>1</sup> and the MARC Advisory Board<sup>2</sup>, both composed of many renowned international arbitration specialists<sup>3</sup> of diverse origins<sup>4</sup>. Dipna discusses the latest trends in arbitration as well as the top reasons for clients to refer their disputes to MARC.

*What are the main trends shaping international arbitration at the moment?*

This year, several key trends and geopolitical events have been - and are still - shaping the international arbitration landscape, such as:

- (1) the use of artificial intelligence but also the importance of cybersecurity and data protection which are essential components in this field;
- (2) the future of intra-EU bilateral investment treaties (BITs) following the Achmea decision<sup>5</sup> delivered by the Court of Justice of the European Union in 2018 and the potential impact that it might have on non-member States of the EU, especially in Africa. Indeed, it is in the wake of a joint declaration issued in January

2019 by 22 EU Member States that Mozambique even tried to raise an objection in an ICSID case against an Italian investor by invoking that the Achmea decision should also apply to BITs between EU member States and non-member States. However, the arbitral tribunal dismissed in its award<sup>6</sup> the African State's objection that the Achmea decision precluded the tribunal from hearing a dispute under a BIT signed between an EU Member State and a third country;

- (3) the reforms to Investor-State Dispute Settlement (ISDS), following discussions held in October 2019 during the session of the UNCITRAL Working Group III on ISDS;

<sup>1</sup>With Neil Kaplan as its President, tasks of the MARC Court include prima facie decisions on MARC's jurisdiction to accept a case, the appointment of arbitrators in the absence of agreement between the parties, decisions on challenges raised against arbitrators and decisions on other issues related to procedure.

<sup>2</sup>The Chair of the MARC Advisory Board is Sarah Grimmer, Secretary General, Hong Kong International Arbitration Center. This body is consulted on matters relating to MARC's development policies and best practices as well as on projects and initiatives to further the development of ADR methods as effective trade and business facilitation tools.

<sup>3</sup>The full list of members is available on the MARC website.

<sup>4</sup>Members of the MARC Court and the MARC Advisory Board come from Asia (Malaysia, Hong Kong, India, China, Pakistan) and Africa (Kenya, Nigeria, Mauritius, Cameroon, South Africa, Ethiopia, Somalia) sitting together with western ones (UK, Canada, USA, Germany, France, Switzerland).

<sup>5</sup>Please refer to the Judgment of the Court (Grand Chamber) of 6 March 2018, *ECJ, Case 284/16, Slovak Republic v Achmea BV* which held that Intra - EU BITs are incompatible with EU law.

<sup>6</sup>ICSID Case No. ARB/17/23, Award, 28 October 2019.



(4) the China's Belt and Road Initiative (BRI), which is currently one of the largest investment programmes ever undertaken and heading soon into its 8th year, should lead to a significant number of disputes being referred to arbitration, even if it is important to take into account the cultural positive attitudes of Chinese parties towards mediation and settlement of disputes. Indeed, CIETAC 2018 statistics<sup>7</sup> (of 2962 cases) and HKIAC 2018 Statistics<sup>8</sup> (of 521 cases, indicating Hong Kong and Mainland China at the first and second ranks of its top ten geographical origins or

that will be able to have a real influence on the selection of the seat, arbitration institution, and geographic convenience;

(5) the promotion of diversity on arbitral tribunals, especially in arbitrations connected to Asia and/or Africa. Following Jay-Z's complaint in November 2018 regarding the lack of ethnic diversity for the appointment of arbitrators<sup>10</sup> and the Arbitration in Africa Survey published in 2018 by the School of Oriental and African Studies (SOAS)<sup>11</sup>, Dr Emilia Onyema of SOAS and other international arbitration practitioners<sup>12</sup> have

especially in Asia-Pacific and Africa. The ambition showcased by these centers is not an unrealistic goal as it forms part of the development of international arbitration and the will of various continents, regions, and countries to be more involved in this field.

*What does your role as Head of MARC involve?*

As the Head of this institution, I supervise the administration of arbitration and mediation matters under the MARC Rules or other rules or ad hoc cases. I am also responsible for maintaining state-of-the-art case management and procedures at the center. I also ensure that high standards of governance are followed at MARC as I am also in charge of the running of the MARC Secretariat.

With the support of the MCCI Board and Secretary-General, the MARC Court and the MARC Advisory Board, I am also responsible for developing and promoting international arbitration in Mauritius and the MARC, on domestic, regional and international levels. I also work on consolidating and developing strong relationships with other arbitration centers, with professional associations, legal and business professionals as well as entities from both the private and public sectors. To do so and to promote MARC, my team and I often organize arbitration events and training sessions, locally and internationally. I also participate in and speak at various events in Mauritius and abroad. These business development tasks, undertaken in Mauritius and abroad, are essential to market this arbitration center and to raise awareness about its activities and services.



An arbitration institution and/or a seat can only become successful with the support of the local legal and business community.



nationalities of parties) clearly demonstrate that international arbitration seems to be a viable means of dispute resolution for matters involving Chinese parties. However, will the current political turmoil in Hong Kong potentially affect the use of Hong Kong as a neutral seat and the use of HKIAC as one of the ideally positioned institutions to manage disputes involving Chinese parties? Only time will tell. Moreover, Africa is also trying to promote its local arbitration institutions for disputes between Chinese and African parties<sup>9</sup>. Nevertheless, it is mainly the party that has the strongest bargaining powers

launched, in September 2019, The African Promise<sup>13</sup> which is a pledge undertaken by arbitration practitioners and entities (such as counsel, arbitrators, representatives of corporates, States, arbitral institutions, academics and others) to achieve main objectives such as the increase of appointments of Africans as arbitrators, especially in cases connected with Africa but also the improvement of profiles and representations of African arbitrators;

(6) finally, certain regions kept on pushing, during this year, for their desire to be recognized as Regional Arbitration Hubs,

<sup>7</sup>Statistics are available at: <http://www.cietac.org/index.php?m=Page&a=index&id=40&l=en>

<sup>8</sup>Statistics are available at: <https://www.hkiac.org/about-us/statistics>

<sup>9</sup>e.g. the China Africa Joint Arbitration Centre (CAJAC).

<sup>10</sup>Judge Halts Arbitration In Jay-Z Suit Because Of Racial Bias, The Legal Entertainment, *Forbes*, 29 November 2018 available at: <https://www.forbes.com/sites/legalentertainment/2018/11/29/jay-z-successfully-halts-arbitration-due-to-racial-bias/#598dcfef6f5a>

<sup>11</sup>SOAS Arbitration in Africa Survey – Domestic and International Arbitration: Perspectives from African Arbitration Practitioners, 2018 available at:

<https://eprints.soas.ac.uk/25741/1/SOAS%20Arbitration%20in%20Africa%20Survey%20Report%202018.pdf>

<sup>12</sup>Dr Emilia Onyema, a lecturer on international arbitration at SOAS University of London; Simmons & Simmons' head of international arbitration Stuart Dutson; and Kamal Shah, head of the Africa and India groups at Stephenson Harwood.

<sup>13</sup>The African Promise—redressing the balance in international arbitration, Interview conducted by Jenny Rainer, *Lexis PSL Arbitration*, 25 September 2019 available at: <https://www.lexisnexis.co.uk/blog/dispute-resolution/the-african-promise-redressing-the-balance-in-international-arbitration>



*What are the challenges that come with this role?*

Even if I am extremely grateful for this amazing opportunity as I have the chance to work in international arbitration and to bring my contribution towards the development of this field in my country and in the region, I have to admit that this role also comes with some challenges.

Indeed, it is not an easy task to develop and promote an arbitration institution in an international market that is extremely competitive and dominated by leading institutions. Therefore, it is extremely important for regional arbitration centers, like MARC, to stand out and to display its strengths and unique characteristics. Another challenge - that I currently have to deal with - comes from the domestic market itself.

An arbitration institution and/or a seat can only become successful with the support of the local legal and business community. However, it seems that companies and counsel in Mauritius have been, in the past, more inclined to use judicial proceedings before domestic courts or to even use ad hoc proceedings rather than institutional ones when

they were using arbitration to resolve their disputes. Consequently, additional, and collaborative efforts need to be made so that domestic contracts include an arbitration clause (with a local arbitral institution ideally indicated in that clause) and that the legal and business community in Mauritius would use more often institutional arbitration to resolve their disputes.

*Recently we have seen new arbitration centers being established globally. How is MARC standing out in a crowded field?*

One of the major strengths of MARC is its independent and robust governance structure involving Mr Neil Kaplan<sup>14</sup> CBE QC SBS who is often described as “the father of Hong Kong arbitration” and who has been spearheading significant developments in the international outreach of MARC.

This independent and neutral institution has been providing to the business and legal community a cost-effective, confidential, fast, and efficient way to resolve their disputes by means of arbitration and/or mediation. A dedicated mediation package has also been launched for SMEs and the Secretariat is currently working on an arbitration procedure

for small claim disputes, with a document only option. MARC is also devoted towards actively promoting ADR methods on a local, regional, and international scale by organizing prestigious training sessions and events (often with foreign law firms and arbitration institutions), including the Mauritius Arbitration Week (MAW). The MAW is a week dedicated to arbitration and its role in facilitating investment and trade across the globe. It is marked by a series of events on hot topics by leading practitioners addressing important issues and development in this field. Events for the MAW include conferences, seminars and workshops, social and networking events.

The first edition of the MAW took place in May 2018 during which the latest version of the MARC Arbitration Rules (“Rules”) was launched. These Rules reflect the best international practices and have been reviewed by a broad range of experts globally. They are a comprehensive tool kit of tried and tested provisions as well as innovative provisions that offer great transparency to users. Moreover, the overarching aim of these Rules is to facilitate the conduct of arbitrations as swiftly as possible with a view to minimizing time and costs<sup>15</sup>. These

<sup>14</sup>The President of the MARC Court is Neil Kaplan CBE QC SBS, a former President of the Chartered Institute of Arbitrators and Chair of the Hong Kong International Arbitration Centre (« HKIAC »).

<sup>15</sup>Please refer to question 5 to read more about these MARC Arbitration Rules 2018.

<sup>16</sup>These Rules were translated from English to French by FTP&A Paris and launched during the Paris Arbitration Week in April 2019.

Rules were translated in French<sup>16</sup> and Chinese<sup>17</sup> to become more user-friendly to potential users located in Africa, in particular for French-speaking countries, and in Asia, in particular for Chinese parties.

the Arbitration Foundation of Southern Africa, amongst others. Through its MARC Advisory Board, it also strives for excellence in the field of ADR through continuous consultation work with the legal and business community of Mauritius and of foreign country partners.

cases was recently at the MARC for a major construction arbitration case under the MARC Arbitration Rules. He has congratulated MARC on its ability to provide excellent hearing facilities for this four-party international arbitration, which was held, for more than a week, at the MARC premises, involving foreign parties, 14 Counsel and advisers (both foreign and local), a state-of-the-art transcription facility, tribunal room and dedicated party break-out rooms with catering and support services.

Moreover and for the first time in 2019, the MARC hearing facilities were used twice to host Privy Council hearings, via video-conference, after having passed tests to check that the MARC hearing room and facilities are in conformity with the criteria required by the IT Team of the Judicial Committee of the Privy Council in London.

Finally, MARC has been paving its way towards establishing itself as one of the region's top dispute resolution centers in the Indian Ocean as it is currently the arbitration center with the highest caseload, managing both international and regional/domestic cases (the current ratio is 40% - 60% respectively).

*Can you tell us a bit about the MARC arbitration & mediation rules? What makes them distinctive?*

MARC launched its latest arbitration rules in 2018. The new MARC Arbitration Rules aim to facilitate the conduct of arbitrations as swiftly as possible with a view to minimizing time and costs.

- i) New features that were introduced include the emergency arbitrator procedure. This provides for an arbitrator to be appointed within 24 hours and decide any application for urgent interim or conservatory relief that cannot wait for the constitution of a tribunal



The second edition of the MAW took place in June 2019 and attracted many speakers from Europe, Asia, and Africa as the theme was 'Mauritius as a bridge between Asia and Africa'. Indeed, MARC positions itself as a Neutral Dispute Solution Interface within Africa as well as between Asia and Africa.

Moreover, it participates actively in the national and regional development of ADR methods in collaboration with regional organizations such as the Indian Ocean Commission and the Union of Chambers of Commerce and Industry of the Indian Ocean Islands, notably through a platform it launched with other arbitral institutions in the region: the Business Bridge Indian Ocean. MARC has also established partnerships and special relations with other arbitration centers in Europe, Asia and Africa, such as the *Centre de Mediation et d'Arbitrage de Paris*, the Hong Kong International Arbitration Centre, the Shenzhen Court of International Arbitration,

MARC also launched, in July 2017, MARC45 which is an official group for young practitioners, pupils, and students of the arbitration community in Mauritius, Africa, Asia and beyond.

In terms of services and facilities, MARC has sophisticated hearing venues as well as support services such as transcription, translation, tribunal secretary services, document storage facilities, and usual business center services. The functional facilities provided by MARC for the conduct of arbitration hearings at its premises in Port Louis can benefit users of both domestic and international arbitrations, whether involved in MARC arbitrations or other arbitration rules. MARC is amongst the few centers providing such functional facilities in the Indian Ocean Region. Mr Anthony Canham, a Civil Engineer by profession and a renowned international arbitrator, having been appointed 17 times as an international arbitrator and in more than 200 construction arbitration

<sup>17</sup>They were translated from English to Chinese by DaHui Lawyers Beijing and launched in Beijing during the first annual China-Africa Law Forum in July 2019.



- within 14 days.
- ii) In addition, for small claims for less than 25 million Mauritian rupees (approx. € 625,000), parties can opt for an expedited procedure lasting six months.
  - iii) A procedure for the summary dismissal of claims or defenses has also been introduced.
  - iv) Further articles provide for jurisdictional objections that can be raised to be decided *prima facie* by the MARC Court if raised prior to the tribunal's constitution and otherwise by the tribunal itself and allow joinder and consolidation of claims.
  - v) The rules require more information at the commencement of the arbitration than previously, to ensure efficiency and allow parties a free choice of arbitrators, without restricting this to a list.
  - vi) Striking and innovative opt-in provisions provide for the blind appointment of arbitrators<sup>18</sup> so they do not know which party picked them and for parties to agree to only produce documents that they intend to rely on in their pleadings, subject to the tribunal's power to order the production of additional documents in exceptional circumstances.
  - vii) The rules state that unless otherwise agreed, tribunals may adopt any procedure they see fit to avoid unnecessary delay or expense, having regard to the complexity of the issues and amount in dispute, and provided that the procedure ensures equal treatment of parties and allows them a reasonable opportunity to present their case.
  - viii) It also includes a requirement that the tribunal and parties "do everything necessary to ensure the fair and efficient conduct of the arbitration". In line with this, tribunals have a new power to exclude new legal counsel from a case if their appointment may result in or potentially result in a conflict of interest.
  - ix) Furthermore, parties can request correction or interpretation of awards or additional awards and, as another opt-in, can agree to the appeal of the award on points of law only.

“

These [MARC] Rules reflect the best international practices and have been reviewed by a broad range of experts globally.

”

or mediation disputes. Potential users should also consider MARC if they are looking for a bilingual Secretariat which is amongst the few arbitration teams in Africa to be able to manage cases in both French and English.

*This interview was originally published on Leaders League's website and is available at:*

*<https://www.leadersleague.com/en/news/dipna-gunnoo-marc-is-a-premier-dispute-resolution-center-managing-cases-in-english-french>*

*Interviewed by:*



**Sneha ASHTIKAR**

Managing Editor  
Leaders League  
France

*Can you tell us why clients should refer their dispute to MARC?*

If you are looking for an arbitration center that provides an excellent quality of services with international standards and at competitive rates<sup>19</sup>, then MARC was made to assist you with your arbitration and/

<sup>18</sup>This innovative feature was discussed in the following publication: Blind arbitrator appointment procedures – a welcome sight in institutional rules?, Elan Krishna & Matthew Brown, Clifford Chance Asia, Singapore, *IBA Arbitration Committee newsletter*, May 2019, available at: <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=B4D1E884-52C7-44A3-805A-7FE8CCBA5183>

<sup>19</sup>In terms of costs, the MARC offers the most competitive rates for administrative costs [only 65,000 MUR (approx. 1850 USD) as case filing fee and as from 75000 MUR (approx. 2140 USD) for cases with sums in disputes of up to 1.5 million MUR]. By comparison, for a similar case, the case filing fee for an ICC arbitration is 5000 USD and the minimum administrative cost is 5000 USD.

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# The African Promise

## *Redressing the balance in international arbitration*



an African 'Pledge'. We felt this was workable and so set about drafting one. A few months later, while giving the keynote speech at our SOAS Arbitration in Africa conference 2018 in Kigali, Professor Dr Mohamed Abdel Wahab mentioned as one of the solutions, the need to adopt an 'African Pledge'. This call by Professor Dr Abdel Wahab convinced us that we were on the right track with our pledge. We engaged with the Equal Representation in Arbitration (ERA) Steering Committee leaders for their support of the draft version of our pledge. We are grateful to ERA for their comments which led to the final text of the now African Promise.

### *What are the aims of the Promise?*

The aims are twofold as stated on the Promise webpage:

- to improve the profile and representation of African arbitrators (in international arbitration), and
- to appoint Africans as arbitrators (especially in arbitrations connected to Africa)

It is our desire that the most qualified individual is appointed for any arbitration, but we particularly felt that Africans should not be left out of Africa-connected disputes—as strongly urged by Professor Dr Mohamed Abdel Wahab in his keynote speech.

### *Why is it required?*

As I mentioned above, this is because of the obvious lack of diversity (or inclusivity) in the pool of international arbitrators, which is not because there are no qualified Africans to be appointed. The second and more critical reason is that the international community and the development of international arbitral

**I**n a bid to increase the number of Africans appointed as arbitrators and promote diversity and inclusivity in the international arbitration community, Dr Emilia Onyema of SOAS University of London, Dr Stuart Dutson, partner at Simmons and Simmons, and Kamal Shah, partner at Stephenson Harwood LLP London, have produced an 'African Promise' (the Promise). Onyema explains how this promise came about and outlines what needs to be done to address the issues at hand.

### *What is the Promise?*

The Promise is to be made by arbitration stakeholders and actors to appoint skilled Africans as arbitrators, tribunal secretaries, etc, in international arbitration references. The Promise severally refers to 'Africa connected disputes' for such appointments, but this is our least expectation. Our clear focus and aim is for Africans to be given equal opportunities for arbitral appointments as any other qualified individual.

### *What was the background to the Promise?*

The background to the Promise flows from anecdotal evidence of the very little participation of

Africans in international arbitration (as arbitrators, counsel, tribunal secretaries, etc) which our SOAS Arbitration in Africa Survey report for 2018 empirically confirmed. Prior to the survey report, the issue of diversity of adjudicators in international arbitration became a mainstream topic at conferences and workshops, so the fact that the pool of arbitrators was not diverse (or, even better, not inclusive) was very well known and uncontested. The relevant question was finding a solution for this lack of diversity or inclusivity.

Dr Stuart Dutson and I started exploring various possible solutions to this issue and one of the 'solutions' we thought could set us on a remedial track was adopting



practice and jurisprudence should not be left only to individuals espousing a particular world view, crowding out other voices and views from other parts of the world. This, in my opinion, cannot possibly be correct and evidently does not represent the rainbow world we inhabit.

*What other work do you think should be done to address diversity issues in international arbitration?*

In addition to actors signing up to Pledges and Promises, we need to put in place a monitoring system that is evidence-led. The evidence we generate will help us understand what the problems are, where the bottlenecks are and help us to design interventions that will answer to these gaps and improve the international arbitration system. Inclusivity heavily facilitates acceptance and legitimacy of the system. This, of course, may need our having a clear understanding of what we mean by diversity (and its degrees or intersections) in international arbitration.

For me, the next phase of work in this regard is putting in place a robust monitoring system. As we request in the Promise, statistics of Africans nominated for appointments onto arbitral panels should also be published by arbitral institutions, etc. Such data will provide us with information of those acting on this Promise and will help us monitor the increase (or decrease)

in the number of Africans nominated to be appointed onto arbitral tribunals. It will also enable us to know the numbers of those actually appointed and by whom, and again help us monitor the increase or decrease of such appointments.

The same exercise can be done for women, younger practitioners, etc. Arbitral institutions currently publish statistics on the number of women appointed onto their panels and by whom, but we also need to know the numbers nominated for appointment (and not only those appointed) and by whom. The simple reasoning is that an individual needs to be nominated before they are appointed as arbitrator. For example, if institutions (or parties) are nominating

more Africans than those appointed, we then can see where the gap lies. This will inform further research into understanding the behaviour of the actor who refuses or fails to appoint the nominated Africans. The results of this research will form the basis of any remedial actions (such as further training, etc) to be suggested to those Africans desirous of participating in the international arbitration process as arbitrators, tribunal secretaries, counsel, etc.

*Do you think there is scope for collaboration between different groups to ensure all aspects of diversity are respected and appropriately promoted in international arbitration? Do you think such collaboration is necessary to achieve their ultimate goals?*

To answer the first part of the question, yes, there is scope for collaboration and, if I may add, recognition of the prior work of colleagues in this field is very important. This is why we discussed our text and plan with the ERA Steering Committee leads before we published the Promise. They gave us helpful comments which we implemented in producing the published finalised text. I am also a member of the ERA Steering Committee. Thus, for me, collaboration, transparency and generosity of sharing prior learning with newcomers are very important.

My answer to the second part of the question is also a yes—I think these sorts of collaborations are necessary. The key issue here is what we ultimately want to achieve. We want the provision of equal opportunities for all involved in this business—women, men, young, old, middle-aged, different geographic locations, etc. If our target or goal or destination is the same, we can support each other and share our learning in our journey to getting to our goal. We do not necessarily have to follow the same route but we must be willing to share our learning and support each other. In this spirit, the ERA Steering Committee leads shared their experience with the ERA pledge and their learning with us in our drafting of the Promise. I encourage colleagues to read and sign up to the ERA Pledge and the Promise and more importantly, action the undertakings they make in the Pledge and the Promise.

*Interviewed by Jenny Rayner.*

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# Isn't 700 Years Long Enough? Time to Think Again About Costs: The Twenty-Fourth Goff Lecture 2019



The second pleasure is that I delivered the Sixth Goff Lecture in 1996 and I am delighted to be invited again. Either the first one was no good and the Dean has generously given me a second chance to redeem myself, or it was so good that he expects a repeat performance. I will let you be the judges of that.

The Sixth Lecture dealt with the question whether the requirement of writing for the arbitration agreement as set out in article II of the New York Convention was outmoded and inconsistent with modern methods of doing business.<sup>1</sup>

The genesis of the lecture was a seemingly simple case that came before me in May 1994. In *H Smal Ltd v Goldroyce Garment Ltd*,<sup>2</sup> the parties had enjoyed previous commercial dealings. Although not stated in the judgment, I seem to recall that the plaintiff ordered denim jeans from the defendant. The plaintiff sent the defendant a signed written purchase order which contained an arbitration clause but the defendant never returned a signed copy. Nonetheless, the defendant delivered the jeans in accordance with the purchase order. They were paid for. When delivered, they were the wrong colour and the plaintiff commenced an arbitration in Hong Kong. Because no agreement could be reached as to the identity of the arbitrator, the plaintiff applied to me for the appointment of an arbitrator effectively pursuant to article 7 of the Model Law.<sup>3</sup>

**I**n this article, the author considers the vexed question of costs in, particularly, international arbitration. The approaches of the English and American rules of costs apportionment are considered in the context of case management, along with a number of possible modifications or alternative approaches. The article is an edited version of the Twenty-Fourth Goff Lecture delivered by the author at the Hong Kong International Arbitration Centre on 2 April 2019.

## Introduction

It is a great pleasure and honour to be invited to give the Twenty-Fourth Goff Lecture sponsored by the City University of Hong Kong. It is a particular pleasure for me for two reasons.

Firstly, I was intimately involved in the setting up of this lecture series. At the time of Lord Goff's visit to Hong Kong in 1990, I was the Judge in charge of the Arbitration List and also the Chairman of what was then the Hong Kong Branch of the Chartered Institute of Arbitrators (CI Arb). Lord Goff was at that time the President of the CI Arb.

When my good friend Professor Derek Roebuck, the then Dean of the Faculty of Law at City University, heard of Lord Goff's impending visit he suggested a lecture to be given by Lord Goff which turned out to be the first in this series of now 24.

So, it is an honour to be involved with a lecture series dedicated to the memory of Lord Goff, one of the giants of the common law in the 20th and 21st centuries.

<sup>1</sup>Editorial note: See *Is the need for writing as expressed in the New York Convention and the Model Law out of step with commercial practice?* The Sixth Goff Lecture (1996) 5 *APL* Rev 1-23.

<sup>2</sup>*H Smal Ltd v Goldroyce Garment Ltd* [1994] 2 HKC 526. Editorial note: Available at <http://neil-kaplan.com/wp-content/uploads/2013/08/H.-Smal-Limited-v-Goldroyce-Garment-Limited-HCMP908-of-1994.pdf>.

<sup>3</sup>Editorial note: The application was made under s 12 of the now repealed Arbitration Ordinance (Cap 341) but was objected to on the ground that there had been no compliance with art 7 of the Model Law.



However, because the plaintiff could not produce a copy of the agreement signed by the defendant, I was bound under the then (1985) version of article 7 of the Model Law to decline to appoint an arbitrator. That struck me as a very strange result. There was no doubt that there was a contract between the parties, but because article 7 then required the written contract to have been signed by both parties, there was no way to compel the defendant to arbitrate.

That lecture, together with other commentary, attracted considerable attention and much discussion and, in short, ignited the debate that led to many amendments to arbitration legislation around the world (particularly in Hong Kong) and led later to the amendments to the Model Law that provided a much wider definition of 'writing' in accordance with modern ways of doing business. So now, when a salvor says to the captain of a sinking ship over the ship's radio, "Do you agree to the Lloyds salvage form?"<sup>4</sup> and the captain of the ship says, "Yes of course I do - please hurry", the arbitration clause contained in that form binds both parties.<sup>5</sup>

### Costs of dispute resolution: Some causes and criticisms

In this lecture, I want to concentrate on a subject close to everyone's hearts, and that is costs.

Most parents would be happy and proud when their child embarks upon a career in the law. Yet, lawyers have come in for much criticism over the centuries. We can ignore Shakespeare's "Let's kill all the lawyers"<sup>6</sup> as being a little extreme. However, there are many other anti-lawyer comments, most of which relate to the cost of conducting adversarial proceedings.

Henry Brougham,<sup>7</sup> a 19th century Lord Chancellor, said:

*"A lawyer is a learned gentlemen who rescues your estate from your enemies and keeps it for himself."*

One of the strongest condemnations came from Timothy Dwight, the President of Yale, when he said to the graduating seniors in 1776:<sup>8</sup>

*"That meanness, that infernal knavery, which retards the operation of justice, which from court to court [and] which upon the most trifling pretenses, postpones trial to glean the last emptying of a client's pocket, for unjust fees of everlasting attendance, which artfully twists the meaning of law to the side we espouse, which seized unwarrantable advantages from prepossessions, ignorance, interests and prejudice of a jury, you will shun rather than death or infamy."*

Bringing matters more up to date, in 1994 the then Sir Thomas Bingham said the fact that the resolution of civil disputes should be so costly was not merely a wart on the face of the administration of justice but a cancer eating into it.<sup>9</sup>

In the same year, Lord Woolf said:<sup>10</sup>

*"A system of justice which a very substantial section of its own citizens cannot afford, is a system which contains a fundamental flaw and leaves them vulnerable to exploitation."*

Now I accept that these powerful statements were made in the context of state court litigation, whereas I am speaking about arbitration, to which possibly different considerations apply.

### The 'costs follow the event' (or 'cost shifting') rule on the allocation of costs

#### History

Most of us in this room have been brought up in jurisdictions where costs follow the event, otherwise known as the 'cost shifting' rule. It has to be recognised that this rule is of ancient origin, having been introduced by the Eastern Roman Emperor Zeno in 487 AD/CE. This rule became part of the Code of Justinian in the first half of the sixth century.

The rule did not reach England until the Statute of Gloucester of 1275, which provided for recovery of the successful plaintiff's costs. It was not until Costs Act of 1607, however, that a statute was passed which put the successful defendant in the same position as a successful plaintiff. These statutes remained the law on the subject of costs until the Supreme Court of Judicature Act of 1875, which set up a procedure with which most of us are familiar but which still retained the rule.

#### Applications of the rule in arbitration rules

When it comes to arbitration, many sets of rules provide a rebuttable presumption that costs follow the event. For example, rule 42(1) of the Permanent Court of Arbitration (PCA) Arbitration Rules 2012 states:

*"The costs of arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case."*

Similar provisions can be found in the rules of UNCITRAL and the LCIA.<sup>11</sup>

<sup>4</sup>Editorial note: The Lloyds Standard Form of Salvage Agreement, or Lloyds Open Form (LOF).

<sup>5</sup>If Option 2 of article 7 applies, the agreement can take any form. However, if Option 1 applies, the parties have to record their agreement "in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means."

<sup>6</sup>Henry VI, Part 2, Act IV, scene 2.

<sup>7</sup>1st Baron Brougham and Vaux (1778-1868), *The Mirror of Literature, Amusement and Instruction*, 19 October 1844, p 268.

<sup>8</sup>Timothy Dwight, A Valedictory Address to the Young Gentlemen, Who Commenced Bachelors of Arts at Yale College, July 25th, 1776, reprinted in *American Magazine* (January 1788), p 101.

<sup>9</sup>Sir Thomas Bingham, *The price of justice: lecture to the Holdsworth Club, University of Birmingham* (18 March 1994).

<sup>10</sup>See Ministry of Justice (England & Wales), *Access to Justice: Final Report by Lord Woolf* (July 1996).

<sup>11</sup>See article 42 of the UNCITRAL Arbitration Rules 2013 and article 28.4 of the LCIA Arbitration Rules 2014.

### *The American rule on allocation of costs*

As we all know, the United States went in a different direction. The issue came before the Supreme Court as early as 1796 in the case of **Arcambel v Wiseman**.<sup>12</sup> The lower court had ordered the losing party to pay \$1600 toward the successful party's costs. In reversing, the Supreme Court said:

*"We do not think that the charge ought to be allowed. The general practice of the United States is in opposition to it and even if that position were not strictly correct in principle, it is entitled to the respect of the Court until it was changed or modified by statute."*

An explanation for this view might be an American reluctance to kick a man while he was down. Another might have been the fear that the risk of paying the other side's costs if unsuccessful would act as a disincentive to bringing an action, and could thus be seen as a possible bar to access to justice. Interestingly the English view is the opposite, namely the fear of not being able to recover your costs if successful would be a possible bar to access to justice.

By 1829 in New York, counsel's fees were recoverable if successful. In that year, the recoverable sum was fixed at \$3.75. That fixed fee was never altered and as lawyers' fees increased over the years, the recovery was tantamount to nil.

Interestingly in the USA, the issue of costs recovery in arbitration depends on whether the case is domestic (under the American Arbitration Association Commercial Arbitration Rules 2013 (AAA Rules)) or international (under the International Center for Dispute Resolution Arbitration Rules 2014 (ICDR Rules), which are the international rules of the AAA).

Under the AAA Rules, it is provided that the award may include:<sup>13</sup>

*"an award of attorney's fees if all parties have requested such an award or it is authorized by law or their arbitration agreement."*

The ICDR Rules give more discretion to the arbitrators by providing:<sup>14</sup>

*"The arbitral tribunal shall fix the costs of arbitration in its award(s). The tribunal may allocate such costs among the parties if it determines that allocation is reasonable, taking into account the circumstances of the case."*

"Such costs may include:

...

d. the reasonable legal and other costs incurred by the parties; ..."

### **Re-examining 'costs follow the event'**

#### *Relevant factors influencing possible change*

So I guess the crucial question I need to address is why mess with something that has been around in England for 700 years? Posing that question reminds me of the tetchy English judge who, when he heard 'law reform' mentioned, exploded: "Reform? Reform? Aren't things bad enough already?"<sup>15</sup>

The law often lags behind social change. For example, it was proposed in Simon de Montfort's reforming parliament in 1258 that the subsequent marriage of the parents should legitimate a child. Although this change would have been in line with canon and civil law and was therefore supported by the bishops, the earls and barons opposed it, possibly because of an antipathy to civil law or an adverse impact on rights of succession.<sup>16</sup> The measure was therefore rejected. Despite the rule applying in Europe and beyond, it did

not become law in England for 700 years, until the Legitimacy Act of 1926.

So, my point is that we should not necessarily be hoodwinked by the age of a law but should re-examine it in the light of current circumstances.

I need hardly point out the differences in the legal, social and political climate between 1275 and 2019. Things have changed and rules made then do not necessarily fit in with modern conditions - just as article II of the New York Convention of 1958 and article 7 of the Model Law needed updating in the light of modern methods of doing business.

So, what are the changes that have occurred that justify a reconsideration of the cost shifting rule?

- (1) Society has become incredibly more complex, which in turn impacts upon the complexity of disputes.
- (2) The areas in which the law intervenes have increased enormously.
- (3) Arbitration has become the preferred method for resolving disputes between entities from different jurisdictions.
- (4) Arbitral awards are far easier to enforce as a result of the widespread adoption of the New York Convention.
- (5) Arbitral awards are hard to challenge.
- (6) The conduct of arbitrations is aping state court litigation.
- (7) Arbitration has become an important mainstay of commercial law firms' practice.
- (8) Fees for arbitration cases have increased sharply, as have the number of lawyers and paralegals assigned to such cases.

<sup>12</sup>US Supreme Court, **Arcambel v Wiseman**, 3 US 3 Dall 306, 306 (1796).

<sup>13</sup>AAA Rules, Rule R-47(d) ii.

<sup>14</sup>ICDR Rules, article 34.

<sup>15</sup>An outburst attributed to, among others, Mr Justice Astbury, a judge of the Chancery Division from 1913 to 1929: see Lord Justice Bean in a paper of this title delivered at Middle Temple Hall on 19 July 2018, available at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/07/Sir-Davis-Bean-Speech-July-2018.pdf>, at p 1.

<sup>16</sup>See JD White, in *Legitimation by Subsequent Marriage* (1920) 36 LQR 255 et seq.



(9) Modern technology has facilitated longer and more detailed pleadings, submissions, document production and witness statements, and has added significantly to the cost and complexity of arbitration.

#### *The nature and effects of large claims for costs*

The combined effect of all the above is to place a huge burden on counsel as well as the arbitral tribunal. The fact that costs are so considerable gives the claim for costs a life of its own. Everything is thrown in, so that success is more likely and no stone left unturned. The result is that we have seen combined claims for costs at the end of an arbitration as high as US\$80m but frequently in the US\$20m-\$40m bracket.

In my opinion, these all too common large claims for costs cause two

problems. First, because cost recovery becomes so important, everything is thrown in - the good, the bad and the very bad. This has the effect of exacerbating delay and cost.

Second, I believe that the claim for costs acts as a disincentive to settlement. Settling a claim can sometimes be achieved but the settlement breaks down when one party insists on its costs and the other refuses emphatically. When the ratio of costs to the amount initially in dispute is too high, there is typically no range in which a mutually agreeable settlement is feasible.

I now return to the issue whether the non-recovery of costs can act as a disincentive to bringing an arbitration or whether we should take the American line that the prospect of having to pay the successful party's costs is just as important a disincentive.

In considering this question, one has to draw a distinction between state court litigation and arbitration. It

might seem offensive that an injured plaintiff who is forced to seek redress in the courts should have its recovery cut down by having to pay its own lawyers' fees. If this were the rule, my guess is that damages awards would be increased to take this into account.

I think it is arguable, however, that very different considerations apply to arbitration, and international arbitration in particular. Of course, we sometimes see the David and Goliath situation and are able to deal with it, though most cases that come before international tribunals are between entities that can afford to bring and defend the proceedings and which have a mutual desire to keep the costs of dispute settlement within reasonable limits.

Another important factor to throw into the mix is the advent of third party funding (TPF). In Hong Kong, recent legislation has confirmed the view that champerty and maintenance do not apply to arbitration in Hong Kong. Thus, parties with financial problems who



have good cases can get funding, albeit at a cost. We are also seeing well-heeled companies using TPF to lay off risk.

Unlike Hong Kong, England & Wales allows conditional fees. This enables lower fees to be agreed, but subject to an uplift in the event of success. For reasons that are not clear to me, there is opposition to this in Hong Kong, and this places Hong Kong practitioners at a disadvantage in international arbitration.

It seems to me that rather than having a rebuttable presumption that clearly raises recovery expectations, we would be far better off without one. Instead, the tribunal should start with the conduct of the parties and the reasonableness of their stance. A successful party who may only succeed partially would increase the costs by virtue of the non-successful part of its case.

I can see great advantage in parties not knowing that if they win they will in all probability recover at least part of their costs. This, I think, would give them more skin in the game. They would be more circumspect about spending money that they may not recover. This may limit the 'kitchen sink' approach and thus save on costs and time.

### **The pros and cons of the cost shifting rule and some possible alternative approaches to the allocation of costs**

In many cases, it is not easy to ascertain what is the 'event' that costs should follow. Assume a case in which a claimant claims US\$10 million. This sum comprises five claims of \$2 million each. The hearing lasts five days. The claimant wins on one head of claim only that takes a day to hear. Should the claimant recover all its costs or only a proportion, say one fifth?

(1) Some arbitrators might say that, in the absence of an acceptable offer, the claimant had to go to arbitration to get \$2 million and the fact that it claimed more is irrelevant. I call these 'bottom liners'. Others would say that four fifths of the hearing time was wasted and would award costs accordingly, ie deprive the claimant of four fifths of its costs.

(2) Others might say that as the respondent won on four fifths of the issues, it should get its costs on the issues upon which it won.

(3) Others yet might say that as both parties had some success, there should be no order and each party should bear its own costs.

Uncertainty as to which view would be taken adds uncertainty in settlement negotiations. If I took a poll of you right now, I am pretty confident that there would be a multitude of views.

Accordingly, I believe far more attention needs to be addressed as to the way in which the successful party has presented its case. Over-lawyering should be penalised, as should unreasonable procedural behaviour.

How you win should become more important than just winning alone. It seems to me more appropriate that at the first meeting with the parties, the tribunal should set out explicitly that these factors will be the determinant for costs recovery, not just the result.

I am, of course, conscious that two eminent lawyers - Sir Thomas Bingham and Lord Woolf - have considered whether the cost shifting rule should remain.<sup>17</sup> However, they did so in the context of state court litigation, not arbitration.

It is interesting to note that over 25 years ago, Lord Woolf recognised some of the points I am making.<sup>18</sup> He considered that there were two advantages in keeping the rule. First, he considered it fairer that a successful party should recover a major proportion of its own costs from the unsuccessful party. Second, he considered that the rule deters unmeritorious litigation and encourages earlier settlement.

Lord Woolf was also able to discern three reasons for abandoning the rule. First, it can deter meritorious claims. Second, it favours the wealthy party and third party funder. Third, once litigation is under way, the costs at stake may be so great that the parties feel impelled to press on. Lord Woolf went on to say that:

*"the adverse consequences which flow from the problems in relation to costs contaminate the whole civil justice system. Fear of costs deters some litigants from litigating when they would otherwise be entitled to do so and compels other litigants to settle their claims when they have no wish to do so. It enables the more powerful litigant to take unfair advantage of the weaker litigant."*<sup>19</sup>

Lord Woolf then balanced the conflicting arguments and, in the context of litigation but not arbitration, favoured maintaining the cost shifting rule. He so concluded on the basis that in the future, courts should make more focused costs orders and that they would better case manage so as to keep costs down.

A thorough review of costs in litigation was conducted more recently by Sir Rupert Jackson. In considering the cost shifting rule, his conclusions were as follows:<sup>20</sup>

<sup>17</sup>Editorial note: See, respectively, notes 9 and 10 above.

<sup>18</sup>See note 10 above, at Chapter 7.

<sup>19</sup>Lord Woolf, *op cit* (note 9 above) Chapter 7, para 3.

<sup>20</sup>Rupert Jackson, Ministry of Justice (England & Wales), *Review of Civil Litigation Costs: Preliminary Report*, Vol 2, p 476 (2009).

"The existing cost shifting regime should not be regarded as 'a sacred cow' but on the other hand its complete abolition does not appear to be a realistic option for the foreseeable future. Some of the main issues on which I would particularly welcome views are as follows:

- (1) Whether there are any further discrete areas of litigation where the cost shifting rule should be effectively abolished altogether;
- (2) Whether there is a case for a presumption of one way cost shifting, either in personal injury litigation or across the board, and what issues and options should be considered under such a regime;
- (3) If cost shifting 'one way or two ways' is retained, on what principles it should operate. 'Loser pays' is not the only option. Other options which are more directly based on encouraging earlier and appropriate resolution of claims, including ADR, may well be worthy of further consideration.
- (4) In cases where cost orders are made, whether the rules should mitigate the full impact of such orders, by forms of cost protection either (a) in favour of claimants or (b) in favour of individuals generally."

Sir Rupert introduced costs budgeting for litigation that involves the parties and the judge agreeing a budget for the case and attempting to stick to it so far as possible. I am not sure what he would have recommended had he only been asked to consider the rule in the context of arbitration.

On 20 September 2018, Sir Rupert gave a talk on costs at the Hong Kong International Arbitration Centre in which he suggested that costs



budgeting might be appropriate for arbitration. I am a little sceptical as to whether this would be acceptable in international arbitration. For instance, I could see civil lawyers advocating low costs budgets based on the way they conduct cases and common lawyers having a different perspective. Whereas judges have coercive power and are backed up by rules of court, arbitrators can only suggest. In this regard, it is pertinent to note that section 65 of the UK Arbitration Act 1996 contains a power given to arbitrators to cap recoverable costs.<sup>21</sup> However, I believe that its use is minimal and I have never come across even its mention in cases I have conducted since that time; this is also the anecdotal evidence of my colleagues.

So, is it time for the sacred cow to be abandoned in arbitration? In my view, the arguments against its continuance are becoming more powerful as the complexity and costs of cases increase. I do not want to be too dogmatic about this, but I do think the time has come for there to be a full debate about this question solely in the context of arbitration. It may even

be that different conclusions might be arrived at as between domestic and international arbitration.

The need for a debate on this issue becomes even more pressing when one looks at the results of a study conducted by Snyder and Hughes on the impact of the cost shifting rule on litigation in Florida.<sup>22</sup> Florida is an interesting case study as the English rule was used there from July 1980 to September 1985 before reverting to the US rule. Snyder and Hughes analysed 10,325 medical malpractice cases. They revealed that during the time the cost shifting rule applied, 58% of those cases were litigated, as against only 42% under the US rule. Moreover, the expenditure required to achieve settlement or trial was between 40% and 60% higher in cases proceeding under the cost shifting rule than in those proceeding under the US rule.

Although these figures seem to imply that the use of the cost shifting rule led to fewer settlements, Snyder and Hughes explained that when dropped cases were taken into account, the rule made a case that had been

<sup>21</sup>Editorial note: A similar power is set out in section 57 of the the Hong Kong Arbitration Ordinance (Cap 609).

<sup>22</sup>See E Snyder & J Hughes, *The English Rule for Allocating Legal Costs: Evidence Confounds Theory*, 6 *Journal of Law, Economics and Organisation* (1990) 345-380; J Hughes & E Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 28 *Journal of Law and Economics* (1995) 225-250.

commenced less likely to go to trial. The study went on to conclude that:

*"more cases of low merit tend to be commenced under the US rule than under the English rule. Cases proceeding under the English rule are more likely to be settled or abandoned before trial than cases proceeding under the US rule. Those cases which progress to trial under the English rule are likely to be stronger than those which proceed to trial under the US rule."*

Interestingly enough, the study also revealed that litigation costs were higher under the cost shifting rule. In light of this analysis, it looks like the cost shifting rule deters more claimants with weak claims or limited resources.

If the cost shifting rule were to be abolished, an issue might arise as to whether there should be retained a residual discretion to award costs against either party if that party's conduct both before and during the arbitration were such that it would be offensive to justice not to award some costs against that party. I have set the bar high so that it is clear that only the most egregious circumstances would be caught. I would favour this approach. There is a good example in the case of *Essar v Norscot*,<sup>23</sup> where both the distinguished arbitrator and the English Commercial Court on review confirmed that a successful party with the benefit of TPF could recover as part of its costs the premium paid to the funder. The reason for this was because the losing party's conduct was such that it attempted to destroy the claimant, who was forced to obtain TPF because the losing party had ensured that no other form of funding would be available. This was an exceptional case. If the cost shifting rule were to be abolished and these facts were to be repeated, the residual discretion should cover this sort of unusual situation.

I accept that many may think that neither of the two regimes is perfect, to say the least. So let me conclude by offering another alternative if it be thought that the abolition of the cost shifting rule is a step too far. In arbitrations conducted under the rules of several institutions, arbitrators are remunerated on an *ad valorem* basis. The idea is that the greater the value of a claim and a counterclaim, the more deposits are requested by the institution, and thus the higher the remuneration of the arbitrators. It seems to me that this is a flawed approach. We all know that low value cases can be extraordinarily complicated and huge claims easy. So, injustice is inbuilt to the system. When you add to this that not all institutions stick to the *ad valorem* system but engineer it to control fees in different ways, a justifiable sense of injustice is felt by many arbitrators. This is particularly so when we know that the expenses of

the arbitral tribunal are minor compared to the legal and experts' costs.

I therefore ask, has the time not come when the recovery of legal costs (if ordered) should be on the basis of an *ad valorem* system? On this basis, a party can spend what it likes but will know from day one that its costs recovery (if any) would be limited to the scale. Wouldn't this also be a disincentive to the 'kitchen sink' approach and give rise to internal cost budgeting?

## Conclusion

In conclusion, I think we can do better in dealing with costs in arbitration. More triage, less prolixity, less procedural argumentation, better case management, shorter and more focused submissions, and shorter and more succinct awards would keep them down. But the knowledge that, if you win, you may not recover a substantial portion of your costs may be the oxygen that is needed to achieve these results. Cost is still the major criticism of the system. If the system is to continue flourishing, as it has for the last 40 years or so, we have to take note of this criticism and change practices accordingly. Every system is in need of a periodic health check!

I end by repeating my thanks to City University for this generous invitation, to HKIAC for offering us these splendid premises and, most importantly, to you all for your attention.

I hope very much that I will be invited to give this lecture again in 26 years' time. I hope even more that I'll be able to attend and be capable of delivering it!

<sup>23</sup>[2016] EWHC 2361 (Comm).



# The Mauritius International Finance Centre

BLC Robert & Associates is a full-service independent business law firm in Mauritius with 7 partners and over 20 locally and internationally trained fee earners.

The Law Firm was part of the Mauritius Arbitration Week 2019 and engaged in the seminar themed "Challenges in Recognition and Enforcement of International Awards" as a moderator where panelists discussed the perception of corruption by stakeholders of international arbitration in Africa, the role and importance of strong arbitral institutions, as well as trends of the Courts in recognising and enforcing international awards.

BLC Robert moderated a panel discussion titled "Mauritius: a bridge between Africa and Asia".


BLC Robert is a member of ALN (Africa Legal Network). ALN is recognized by international directories as being the leading network of African Law Firms. ALN recently won the African Network/Alliance of Year prize awarded by The African Legal Awards 2018.



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## PROMOTING THE USE OF ALTERNATIVE DISPUTE RESOLUTION FOR BETTER TRADE AND INVESTMENT IN THE IORA REGION

The Mauritius Chamber of Commerce and Industry (MCCI), supported by the IORA Special Fund, is pleased to announce details of the 'Creation of a network of ADR Centres and a Centre of Excellence for Dispute Resolution in the IORA Region' Project. This project aims to promote the use of Alternative Dispute Resolution (ADR) tools, such as arbitration and mediation, for better trade and investment in the IORA Region, and set up a collaborative platform through which Member States of the Indian Ocean Rim Association (IORA) can share best practices, pool resources and implement joint projects to promote ADR across the region.

With the creation of a Core Group of ADR experts, the project will be moving into its next phases, including:

- The establishment of a network of ADR centres in the IORA region;
- A comparative study aimed at an in-depth analysis of the main mechanisms for dispute resolution through ADR in at least five IORA countries; and
- Training in arbitration and mediation within the IORA region.

### **About IORA**

*The Indian Ocean Rim Association (IORA) is an inter-governmental organisation aimed at strengthening regional cooperation and sustainable development within the Indian Ocean region through its 22 Member States and 9 Dialogue Partners.*



## STAY TUNED

The MCCI Arbitration and Mediation Center is organising - in collaboration with Mumbai Centre for International Arbitration, White & Case and IORA - a 5-day training course in international arbitration. The event will be held at the White & Case office in Johannesburg from 10 to 14 February 2020. Registration is open.

## THE PROJECT TEAM

To implement the project, a team has been set up, composed of experts in Alternative Dispute Resolution from 5 IORA member states, namely Mauritius as Project Lead, Australia, India, Singapore and South Africa. Thus far, members of the Project Team have spoken at Mauritius Arbitration Week 2018 about fostering collaboration amongst ADR institutions in the region, and at the IORA Trade Modernisation Conference, held in Durban in June 2019

## MEMBERS OF THE PROJECT TEAM:

**Mrs. Anjana Khemraz-Chikhuri**  
Deputy-Registrar, MCCI Arbitration and Mediation Center (MARC) & Project Lead, Mauritius

**Mr. Timothy Cooke**  
Partner  
Stephenson Harwood LLP, Singapore

**Ms. Neeti Sachdeva**  
Secretary General  
Mumbai Center for International Arbitration, India

**Mr. Rajesh Sharma**  
Senior Lecturer  
Justice and Legal Studies, RMIT University, Melbourne, Australia

**Mr. Roger Wakefield**  
Director  
Werksmans Attorneys, South Africa



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# Arbitration Talks...



## WHAT ACCORDING TO YOU IS THE MAIN JUSTIFICATION FOR A PRIVATE JUSTICE SYSTEM?

Answer by **Neil Kaplan CBE QC SBS**, President of the MARC Court; International Arbitrator, Arbitration Chambers, Hong Kong

### The Main Justification for a Private Justice System

The first point to note is that arbitration has long pre-dated State court systems. Arbitration was used by the Egyptians, Greeks and Romans and was widely used in the Middle Ages. Some think it reached its zenith in the age of Elizabeth I. Societies always had to provide a mean of dispute resolution apart from sheer force.

In modern times the advantages of arbitration from a commercial perspective are as follows:

#### Privacy

It takes place in private so there is no press present. This is important with regard to sensitive commercial information and confidential trade processes.

#### Confidentiality

The law as to confidentiality varies from State to State. Some States have a statutory confidentiality provision such as Hong Kong and New Zealand. Some laws imply a term as to confidentiality and others do not. England and Wales does; Australia does not. Many rules of arbitration centers also contain a confidentiality provision.

#### Party Autonomy

This means that the parties have a role in the composition of their Tribunal and the conduct of the arbitration. A State Court Judge is imposed upon the parties whereas in arbitration the parties can have some say in the composition of the tribunal. This gives them comfort. It also means that they can fashion their arbitration around the particular dispute bearing in mind cost and time constraints and further they will not be bound by the terms of any appropriate rules of court. Plus, there is considerable flexibility in arbitration.

#### Ease of Enforcement

It is far easier to enforce an arbitral award pursuant to provisions of the New York Convention which applies in over 160 states or territories. It is much harder at the moment to enforce a State Court Judgment in another State – much depends upon multi-lateral Conventions and Treaties.

#### Cost

It used to be thought that arbitration was less costly than State Court litigation. This is probably not the case now save in respect of simple trade arbitrations where the only issue is whether the product complies with a certain standard. A construction arbitration is likely to be more costly and lengthy than a State Court hearing the same matter. This is because the arbitrators have to be paid, premises have to be rented and support staff paid for. In a State Court system, the judge comes basically free with all the trappings of the court system.

#### Expertise

Though it may be cheaper to go to court, one of the problems about going to court, especially with regard to technical matters, is that it is unlikely the Judge will have the necessary subject matter expertise. In arbitration the parties are able to choose their tribunal bearing in mind the level of expertise that is required. This is seen as another advantage.

#### Legal representation

When a case occurs in a State Court only those qualified in that State are allowed to appear in that case. However, in most jurisdictions that is not the position with regard to arbitration. In arbitration you can be represented by whomsoever you please, whether they be a lawyer, non-lawyer, or a lawyer qualified in a different jurisdiction.

There are two distinct perspectives when one addresses the issue of the correlation of arbitration with economic development, depending on whether the issue is considered from the local / place where arbitrations take place or the origins of those who use arbitration to resolve their disputes.

On one hand, one could think, *prima facie*, arbitration, which is sometimes – often wrongly – perceived as a form of “rich” justice, at least for which you must pay “your judges”, requires a high-end level of economic development and a rich environment, in places where it can root itself (Paris, London, Vienna, Hong Kong, Singapore). It is true that arbitration generally costs more than state justice, but that is because it offers an alternative, something else/more, especially what the latter is usually unable to provide: neutrals, competency, efficiency, use of IT... But focusing on this aspect misses the point and falls short of addressing the core issue at stake: if arbitration works in some financial hubs, it is not (just) because these are wealthy places, it is fundamentally because they also afford a level of political and judicial – rather than economic – development that allows arbitration to function properly, since arbitration cannot reasonably be said to work without relying on a strong judiciary that supports it, whether it is before it starts (by declining jurisdiction when faced with an arbitration clause), during the arbitration proceedings (to help in the constitution of the arbitral tribunal) or afterwards (to enforce,

or avoid setting aside, awards). True, though, political and judicial stability does require a certain level of economic wealth. By the same token, the “arbitration economy”, i.e. the money generated by the conduct of arbitrations whether in hotels or institutions, also enriches the local community where these proceedings take place.

On the other hand, this time no longer from a “place” perspective, but focusing on the economic background of those who use arbitration – and actually the two points relate with each other – the reality is that many users in the international arbitration community are companies, businessmen or States, coming from poor countries, precisely because either their counterparties, or even sometimes themselves, do not trust their own judiciary: too biased, too slow, with too few expert judges... From that angle too, the correlation arbitration/economics is to be nuanced: arbitration users often do not come from the most developed or the richest countries.



#### WHAT ACCORDING TO YOU IS THE CORRELATION BETWEEN ARBITRATION AND ECONOMIC DEVELOPMENT?

Answer by **Dr Jalal El Ahdab**, Vice-President of the MARC Advisory Board; Partner, Bird & Bird, France

#### WHAT HAS BEEN YOUR MOST INTERESTING EXPERIENCE AS AN ARBITRATOR?

Answer by **Hon. Yves Fortier, PC, CC, OQ, QC, Ad.E., LLD**, Member of the MARC Court; International Arbitrator, 20 Essex Street, United Kingdom, Cabinet Yves Fortier, Canada

My most interesting experience as an arbitrator was undoubtedly serving for 4 years as President of the London Court of International Arbitration (LCIA).



# Arbitration Talks (Cont'd)...

## 7 clear reasons to choose MARC are:

1. Adoption and implementation of International Arbitration Act based on UNCITRAL Model duly amended in 2013 to bring in international principles for arbitration in Mauritius and well supported by legal fraternity and judiciary;
2. Unique flexibility and hybrid system of civil and common law best suited for ADR mechanisms like arbitration;
3. Well placed geographically for Europe, Africa and Asia Pacific, providing a neutral and independent choice for parties to conduct arbitration in Mauritius;
4. Following best practices in administration of corporates incorporated in Mauritius and doing business worldwide;
5. Excellent network of treaties with several jurisdictions including Africa, India, etc.
6. Experienced secretariat in field of arbitration to deal with the cases and ability to provide administering services in different languages;
7. Up-to-date set of Rules administering arbitrations launched with inputs from legal experts across the world.



## WHY SHOULD PARTIES TO A DISPUTE CHOOSE MARC FOR ADMINISTERING THEIR DISPUTE?

Answer by **Vyapak Desai**, Member of the MARC Advisory Board; Partner, Nishith Desai Associates, India

## WHAT HAS BEEN YOUR MOST INTERESTING EXPERIENCE AS AN ARBITRATION COUNSEL?

Answer by **Rajeev Sharma Fokeer**, Member of the MARC Advisory Board; Partner, FTPA Avocats, France / United Kingdom

In an arbitration matter in which I acted as counsel for the Respondent, a multinational group headquartered in France, the claimant was a former distributor of claimant's products in Middle Eastern countries. Claimant was seeking damages for an alleged abrupt termination of established commercial ties ("*rupture abusive de relations commerciales établies*"). Claimant's founder and representative had submitted a witness statement and to support his case, had also obtained a witness statement from a former country manager of our client, the Respondent. We had found correspondence at the relevant time in which that very same country manager had openly criticized the behaviour of the Claimant's representative and highlighted contractual breaches committed by the Claimant. When cross-examining the Claimant's representative, I presented this contemporaneous correspondence to him, asking him whether that did not contradict his assertions made against the Respondent. In response, in an assured tone, he simply accused the former country manager, his own key witness, of being "a liar". I ended the cross-examination at that point, after pausing to let that statement make its full effect in the hearing room. Opposing counsels were looking at each other in disbelief. I felt there was no need to go any further. Opposing counsel acting for Claimant then tried somewhat desperately to re-direct the Claimant's representative but the damage had already been done. The Claimant's representative had annihilated the credibility of his own key witness and by the same token, his own case. A few months later, the

outcome of the arbitration was an outright victory for the Respondent, with costs of the arbitration awarded in its favour against the losing Claimant. It is fair to think that the statement made by Claimant's party representative at the hearing, undermining his own witness, contributed to that outcome in our client's favour, although the Respondent's defence rested on other evidence and strong legal arguments. It has been said quite rightly of cross examination that it is, if anything, a testing exercise, especially for civil law practitioners. It is by no means an exact science. It can often lead to resounding and embarrassing failures for counsel embarking upon the exercise. It was particularly gratifying in the above matter to have achieved such a positive result. It is of course important for Counsel to prepare a cross-examination thoroughly and equally important to prepare his own witness(es), even if there is no hard and fast rule in either case. It is also essential to reflect carefully before presenting a witness and assess whether there can be potentially more loss than gain in submitting such testimony.





### WHO HAS BEEN YOUR MENTOR IN THE FIELD OF INTERNATIONAL ARBITRATION?

Answer by **Sophie Henry**, Member of the MARC Advisory Board; Executive Director, Centre de Mediation et d'Arbitrage de Paris, France

In the field of international arbitration, I cannot claim to have been influenced by a single personality. My thinking, my knowledge as well as my approach to international arbitration has been built through contact with many talented practitioners, such as Elie Kleiman, Louis Degos, Thomas Clay, Laurence Kiffer, Jalal El Ahdab and Caroline Duclerq, all of whom have, in their very own way, shed light on a new aspect of this subject.



Neil Kaplan is my mentor since 2005.

### WHO HAS BEEN YOUR MENTOR IN THE FIELD OF INTERNATIONAL ARBITRATION?

Answer by **Arthur Ma**, Member of the MARC Court; Partner, DaHui Lawyers, China

### COMMERCIAL ARBITRATION HAS BEEN CRITICIZED FOR ITS OPACITY, WHICH HAS LED TO A LACK OF PRECEDENTS BEING ESTABLISHED IN THE FIELD OF INTERNATIONAL COMMERCIAL PRACTICE. PLEASE COMMENT.

Answer by **Dr Jamsheed Peeroo**, Vice-President of the MARC Advisory Board; Barrister, 36 Stone, United Kingdom, Peeroo Chambers, Mauritius



There is, in principle, nothing wrong for private parties to ensure that their commercial disputes are resolved privately and confidentially. This stems from the fundamental principle that parties are free to dispose of their rights as they wish.

Arbitration has become the main mode of resolving commercial disputes. Commercial arbitration awards are not normally published, and it may be true that this has led, to a certain extent, to a lack of precedents being published in the field of commercial law.

Parties may however agree to have their awards fully or partly published. Awards may also be published in redacted form so as to protect any sensitive information. A relatively recent trend is for arbitral institutions to promote the publication of awards by drawing the parties' attention to the possibility of doing so.

One should not however forget that without access to confidential arbitration, disputes involving trade secrets and sensitive private material might still not end up in Court. The owner of such intellectual property might instead prefer to settle for much less or entirely give up on its claim rather than go to public courts. Access to justice, including private forms of justice, is vital.

Therefore, while there may be some truth in this statement, rendering commercial arbitration entirely transparent is certainly not a solution. Transparency should rather be limited to arbitration involving State or State-controlled entities, in accordance with the principles of accountability in relation to the use of public funds, and perhaps in rare commercial matters where there are important public interests at stake.

# Arbitration Talks (Cont'd)...

Although confidentiality is presented as one of the main advantages of commercial arbitration, it also generates many criticisms. Indeed, it is mainly accused of preventing the development of case law on international commercial practices.

A priori, the criticism is well founded because many interesting arbitral awards remain unknown due to their confidentiality. Their systematic publication is necessary to analyse the general trends of arbitrators with regard to certain legal issues regularly raised before them.

However, it is necessary to qualify the criticism because for several years now, some publications have been dedicated to awards rendered in international commercial arbitration field. We can for instance mention, the Yearbook of Commercial Arbitration published by International Council of Commercial Arbitration (ICCA), or ICC Collection of Awards. These publications are more than 30 years old, which puts into perspective the argument that it is not possible to have case law on international commercial practices. In addition to its collection, the ICC International Court of Arbitration also has partnerships with certain journals (Journal du droit international - The Paris Journal of International Arbitration) for the publication of a chronicle of awards rendered under its auspices.

In addition, due to the strong demand for transparency, other institutions such as the OHADA's Common Court of Justice and Arbitration (CCJA) now provide that extracts from anonymous awards may be published for scientific purposes. To this end, **article 14, paragraph 3, of the CCJA Arbitration Rules** provides: "The Secretariat will inform the parties

*and arbitrators, at the time of notification of any final award made as from 1 January 2019, that such final award, as well as any other award and dissenting or concurring opinion made in the case, may be published in its entirety no less than two years after the date of said notification. The parties may agree to a longer or shorter time period for publication".*

A similar rule is found in ICC arbitration, the **Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration of 1 January 2019** provides: "The Secretariat shall inform the parties and arbitrators upon notification of any final award made on or after 1 January 2019, that such final award and any other divergent or concurring awards and opinions made in the case may be published in full and at least two years after the date of notification".

It follows from the above that there is a real trend towards the publication of awards, it is not a marginal phenomenon. It follows that the criticism is excessive, knowing that if a systematic publication system is to be achieved, it should be accepted by the parties who are very often attracted by the confidentiality of the arbitration.



COMMERCIAL ARBITRATION HAS BEEN CRITICIZED FOR ITS OPACITY, WHICH HAS LED TO A LACK OF PRECEDENTS BEING ESTABLISHED IN THE FIELD OF INTERNATIONAL COMMERCIAL PRACTICE. PLEASE COMMENT.

Answer by **Dr Achille Ngwanza**, Member of the MARC Court; Managing partner, JUS AFRICA, Member of the ICC Court and the IBA Subcommittee on International Arbitration Case Law, France

## WHAT ARE THE PROS AND CONS OF USING AD HOC ARBITRATION, AS OPPOSED TO INSTITUTIONAL ARBITRATION?

Answer by **Hon. Shaheda Peeroo**, Member of the MARC Court; Former Judge of the Supreme Court of Mauritius

In my view, the appropriateness of ad hoc arbitration whether for domestic or international arbitration depends largely on the legal framework that exists in the relevant jurisdiction, the type of the dispute, the amount of the claim, the complexity of the issues involved, the cooperation of the parties, and the choice of a competent arbitrator who charges a reasonable fee and conducts the proceedings in a swift, efficient and cost-effective manner.

### Examples of the shortcomings of ad hoc arbitration are:

1. The parties are often at a loss on the selection of an arbitrator whereas in institutional arbitration they can ask the institution for a list of experts whose competence and experience in the requisite field have been verified.
2. Disagreement on the choice of arbitrator leads to unnecessary recourse to State courts, entailing much delay in ad hoc arbitration. In institutional arbitration, the institution's court promptly appoints the tribunal.
3. The parties may have to decide on several aspects of the arbitral procedure, and sometimes even on the rules of procedure to be applied.

This may prove to be difficult once the dispute has arisen. The arbitral tribunal may then have to decide that issue after inviting submissions from the parties. In institutional arbitration, the procedure is pre-determined and the rules are normally sufficiently detailed to avoid uncertainty. An advantage of ad hoc arbitration could be that it spares the parties payment of the institutional fee. However, arbitral institutions have improved the efficiency of international arbitration by ensuring a speedy resolution of disputes and by regulating arbitrators' fees, which may render the process less costly than ad hoc arbitration. In the relatively rare ad hoc arbitrations where there is cooperation between the parties, and provided that the arbitrator is skilled and charges a reasonable fee, the parties may have their dispute resolved fairly expeditiously and at a lower cost, in a relatively small claim.



## WHAT ARE THE BEST WAYS TO CONTROL THE COSTS OF AN ARBITRATION, WITHOUT COMPROMISING THE FAIRNESS OF THE PROCESS?

Answer by **David W. Rivkin**, Partner, Member of the MARC Court; Debevoise & Plimpton, United Kingdom

The most important control on costs is an active and well-informed tribunal. Tribunals who read each submission when made quickly become knowledgeable about the facts and legal issues. This allows them to shape the arbitration procedure appropriately for that case. For example, they may be able to hear as a preliminary matter an issue that may dispose of some or all of the case. Similarly, they will be able to make sure that document requests only seek documents that are truly relevant and material. It is also advisable for the tribunal to hold a pre-hearing conference

with the parties at which it can give guidance about the facts and issues that it considers most important for the hearing to focus on.





# Arbitration Talks (Cont'd)...

## WHAT ARE THE PROS AND CONS OF USING AD HOC ARBITRATION, AS OPPOSED TO INSTITUTIONAL ARBITRATION?

Answer by **Dr Daniel Sharma**, Member of the MARC Advisory Board; Partner, DLA Piper, Germany

In ad hoc arbitration, no arbitration institution is involved in the proceeding and the parties themselves determine the applicable procedure. One of the advantages of ad hoc arbitration often brought into discussion is that it is said to be more cost efficient, as the parties do not pay for the services of an institution. However, the downside of this cost advantage is that parties, who do not pay for the services of an institution, also do not benefit from those services. For instance, in ad hoc arbitration the parties negotiate the arbitrators' fees directly with the arbitrators, which bears certain risks, including, for example, the risk that both parties try to impress the arbitrators with their generosity. Moreover, the arbitrators in ad hoc arbitration have to administer the case themselves, which can be time-consuming and is likely to increase the arbitrators' costs. In most institutional arbitrations the arbitrators' fees are fixed by the institution and the institution supports the parties and the tribunal throughout the proceeding (e.g., in relation to the constitution of the tribunal, determination of cost advances, challenges of arbitrators, etc.).

Another potential risk of ad hoc arbitrations is timing. In ad hoc arbitrations, the parties should negotiate the applicable procedural rules before the actual arbitration proceeding can begin, which might turn out to be an additional

obstacle for parties which are already in dispute. To avoid lengthy pre-arbitration negotiations in such a scenario, the parties may try to agree on the application of specific arbitration rules, such as the UNCITRAL rules, but whether such an agreement can be achieved is uncertain. In institutional arbitrations, the institution either provides a ready-made framework or decides on the most important procedural points if the parties cannot find an agreement, e.g., on whether a case shall be referred to a sole arbitrator or when the final award needs to be rendered. In such cases the institution will provide a binding solution to avoid further time-consuming discussions or even litigation on procedural issues before the state courts.



IN ISDS, STATES ARE AT TIMES ON THE LOSING SIDE, WITH ENORMOUS AWARDS BEING GIVEN AGAINST THEM IN FAVOR OF AN INVESTOR, AT THE RISK OF JEOPARDIZING THE WHOLE ECONOMY OF A NATION. PLEASE COMMENT.

Answer by **Leyou Tameru**, Member of the MARC Advisory Board; Director, I-Arb Africa, Ethiopia

There have been a few decisions against States in ISDS cases that have had outcomes of large amounts awarded in favor of investors. The most recent example being that of the P&ID vs Nigeria case, where the tribunal awarded the investor over USD 6.5 Billion plus interest. The enforcement of this award would have a drastic effect on the Nigerian economy.

Prior to commenting on the issue, it is important to backtrack and revisit the reasons behind States giving their consent to ISDS. Without diving too much into the history, one of the primary reasons is because States are looking to attract foreign investment and in return for the investment, they provide investors with certain protections including ISDS. This provides the investor with confidence to invest in the country, create jobs and contribute to the growth of the economy. This is, of course, the ideal scenario.

Unfortunately, things do not always work out as planned and both investors and States fail in keeping their side of the bargain on different occasions. The issue raised by the statement above arises when the investor has successfully brought a claim against the State and the time to determine the amount of compensation arrives. As it is the party claiming compensation, the investor presents the tribunal with the assessment and calculation of amount claimed. States, on the other hand, provide their challenges and arguments against this assessment and the tribunal makes its decision after it has heard all parties.

On the one hand, while disputing the financial assessment provided by the investor, States must provide their own financial assessment

and/or request that the tribunal have an independent expert make a financial assessment of the damages and any other compensation sought. On the other hand, while making a decision on the amount to be awarded, the tribunal should have contextual knowledge and understanding of not only the legal issue, but the practical reality of the country where the investment has taken place. This knowledge is particularly important in the determination of the amount to be awarded because, while the numbers show one thing, the reality on the ground could be completely different. The reasoning behind setting the amount should take into account the actual loss of the investor and the reality on the ground, i.e. in the State.

Such awards not only have impacts on the economy of the States but also the future of the ISDS mechanism as States will back away from consenting to ISDS. It is high time for a shift in perspective.





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- Successfully acting for the State Trading Corporation in relation to an application to set aside an arbitration award under SIAC Rules on grounds of public policy. The matter is presently on appeal to the Judicial Committee of the Privy Council.
- Successfully acting for clients in a claim under LCIA Rules in relation to an Africa-based investment that was run in three different languages.
- Successfully assisting in settling a significant dispute under LCIA-MIAC Rules in relation to a sovereign wealth fund.

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# The Fate of the Poor in Arbitration

**The treatment of impoverished parties in arbitration amid fair process and access to justice considerations has been a topic of interest in the recent past. The author offers an update of the French perspective to this potentially sore issue focusing on international commercial arbitration (as opposed to Treaty/investment arbitration), France being one jurisdiction where Court litigation may appear to be more accessible financially to internal commercial arbitration.**

As many learned scholars have surmised, arbitration like the famous Savoy is open to everyone, but not everyone can go there. Does the fact that a party cannot afford to take on arbitration proceedings (as claimant or respondent) make a perfectly valid and accepted arbitration clause disappear?

It is worth remembering that the French Supreme Court decision, in 2016<sup>1</sup> confirmed a Court of appeal ruling by restating that the “obvious inapplicability” (“*inapplicabilité manifeste*”) of an arbitration clause cannot be deduced from the alleged impecuniosity of a party. In this case, the claimant party was under Court liquidation proceedings and the Liquidator acting on its behalf sought to bring an action for damages before the French courts. In the eyes of the French supreme jurisdiction, the arbitration tribunal retains jurisdiction to ensure proper access to justice. These principles set out back in 2013 in the *Pirelli*<sup>2</sup> and *Lola Fleurs*<sup>3</sup> cases, which also introduced the concept of “inseparability”, in respect of counterclaims. In substance, it would be for the arbitrator(s) to decide whether a counterclaim should be examined, even if the counterclaimant

(respondent) has not paid its share of costs, provide that the counterclaim is inseparable from the main claim.

In the *Pirelli* matter, the French *Cour de Cassation* ruled that the impecunious respondent, who could not pay his share of the advance on costs in arbitration proceedings, remained entitled to make counterclaims. The arbitrators accordingly retain jurisdiction to examine such claims where they are deemed “inseparable”<sup>4</sup> from the principal claims. In practice, arbitrators are expected to examine the subject matter and purpose of counterclaims in deciding whether to assess them on the merits along with the main claim. Failing such examination, the award would be exposed to annulment and/or could be deemed ineffective at the enforcement stage. The insolvent

arbitration) arbitration and excluding, for present purposes, ad hoc arbitration, each party must pay a share of the advance on costs, typically calculated by taking into account the monetary value of claims (and counterclaims)<sup>5</sup>. This means that the financially deficient claimant's position is different: if he is unable to pay the advance on costs, his claims may not be examined at all. The *Lola Fleurs* matter related, precisely, to a claimant alleging to have insufficient funds to start arbitration proceedings, just as in the above matter which led to the Supreme Court ruling of 2016 (cited above) where the claimant was under Court liquidation proceedings.

In both instances, the Court of Appeal ruled again that the arbitrators retain jurisdiction to resolve the dispute involving the parties bound by an



respondent therefore has the benefit of the examination of his own claims by the arbitration tribunal, under the subsequent supervision of the Court at the enforcement stage, to guarantee his access to justice.

In institutional (for example, ICC

arbitration clause, thus limiting the role of the French Courts to a subsequent review of the conformity of the award with international public policy.

French Courts refuse to substitute themselves to the arbitral tribunal chosen by the parties. This can

<sup>1</sup>Arrêt n°885 du 13 juillet 2016 (15-19.389) – *Cour de cassation – Première chambre civile SELAFA MJA c/ Airbus Helicopters*.

<sup>2</sup>Arrêt n°392 du 28 mars 2013 (11-27.770) *Cour de cassation – Première chambre civile*.

<sup>3</sup>CA Paris, Pôle 1 – Chambre 1, 26 février 2013, *SARL Lola Fleurs c/ Société Monceau Fleurs et autres*, RG n°12/12953, *ASA Bull.* 4/2013, p. 900.

<sup>4</sup>CA Paris, 7 avril 2015, RG 15/00512.

<sup>5</sup>Articles 37 and 38 of ICC arbitration rules and Appendix III.

provide an efficient filter against manifestly frivolous or artificial claims.

It is unlikely that the French Courts will reverse the above principles or be led to infer that the proven impecuniosity of a party renders an arbitration clause inoperative.

A recent final award handed down in London under ICC Rules gives us some insight of their implications and limitations and how they might (or not) be applied in practice.

In that matter, a claimant brought a claim against the respondent, who in turn raised a counterclaim but was not able to pay the share of the advance on costs. The ICC then fixed separate advances. The claimant paid its share. The respondent did not pay its share, stating that notwithstanding its inability to pay the advance, the matter should proceed on the basis that the counterclaim is “inseparable” from the main claim. The matter did not even reach the tribunal as the ICC decided that the counterclaim had to be deemed withdrawn as per Article 37(6) of the ICC rules.

The claimant then elected to withdraw its claim whilst stating that it “reserves the right to reintroduce the same claims in the future”. i.e. the withdrawal was “without prejudice”.

The respondent in turn purported to seek a ruling from the arbitral tribunal that the claimant’s claim could only be withdrawn “with prejudice” i.e. that such withdrawal meant that the claimant could never bring the same claim(s) again in arbitration (or elsewhere). In French jargon, he sought to obtain a ruling that the withdrawal (*désistement*) went to the cause or right of action (*désistement d’instance et d’action*) as opposed to being a mere withdrawal of the proceedings started on the basis of that claim.

Logically the arbitral tribunal decided that declaring the claimant’s withdrawal “with prejudice” would be unfair and disproportionate, and tantamount to depriving him of access to justice. The withdrawal was held to be without prejudice, allowing claimant to reintroduce his claims. This reasoning can only be approved.

All the same, it is regrettable that the tribunal was not asked to rule on the withdrawal ex officio of respondent’s counterclaims. This would have tested the arbitral tribunal’s powers in deciding whether or not to hear such counterclaims even though the respondent could not afford to pay its share of the advance on costs.

A variety of solutions exist to ensure that the financial state of a party does not prove to be an unsurmountable impediment to acceding to an arbitral tribunal.

One of the parties can always choose to pay the full advance on costs or the arbitration law/rules might evolve to exclude arbitration if a party is in a proven state of inability to finance the proceedings. The impecunious party can now resort to third party financing providers or even crowdfunding platforms allowing litigants to finance a trial by public donations. These methods of financing litigation might sound suspicious when confronted to the French procedural principle “nul ne plaide par procureur”, especially where the litigant party loses actual control of the trial. Another simple way of resolving the issue would be for the parties themselves to exclude the applicability of the arbitration clause, when agreeing to arbitration, by stating that it shall not apply where a party justifies its impecunious state.



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# Should the Courts Intervene to Prevent an Invalid Arbitration?



One of the reasons why Mauritius is considered as a pro-arbitration jurisdiction is because of its courts' effective supervision of – but non-interference in – the arbitral process. Almost systematically, the Mauritius courts decline to hear a dispute when a defendant claims that it is governed by an arbitration clause. However, for understandable reasons, a party may consider that a particular dispute should not be determined by an arbitral tribunal, for example where it is contended that the arbitration agreement is not valid or the dispute in question is not arbitrable. From that perspective, there is a considerable risk that if an arbitral tribunal determines a dispute and the relevant courts subsequently annul the arbitral award or refuse to enforce it on the ground that the arbitral tribunal lacked jurisdiction to do so, the parties will already have incurred significant costs, wasted considerable time and disclosed confidential information and documents to each other in the arbitral process, which cannot be recovered. An attempt to mitigate such prejudice by asking the tribunal to determine its jurisdiction as a preliminary issue is often unsuccessful, especially

when the tribunal considers that the jurisdiction or arbitrability issue is interlinked with the substantive issues in the case and that it is better to determine all issues together.

The sacrosanct principle on which the Mauritius courts consistently rely is that of *competence-competence*, i.e. it is for the arbitral tribunal to determine whether it has jurisdiction to determine a dispute. This principle was well established in the Mauritius caselaw even before it was expressly laid down in the International Arbitration Act. Of course, the arbitral tribunal's decision is in principle subject to a subsequent review by the courts. The practical commercial difficulty of waiting for that review is self-evident and explained above.

There are nevertheless limits to the scope of application of the principle of *competence-competence*. In exceptional circumstances, parties can ask the court to intervene at the outset in order to restrain the opposing party from proceeding with an arbitration.

One such exception is found in section 5(1) of the International Arbitration Act, which provides that on the relevant application being made, the Court should refer the parties to arbitration “unless a party shows, on a *prima facie*

basis, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed”. Commenting on this provision, in **UBS AG v The Mauritius Commercial Bank Ltd [2016 SCJ 43]** the Court held that “[t]he burden put in this way means that the hurdle has been set high since the objecting party has to satisfy, on a *prima facie* basis, the very high threshold imposed by the “very strong probability” standard”.

That said, it is not only in the circumstances of an application under section 5(1) of the International Arbitration Act that the courts may determine whether it is appropriate to restrain a party from referring a matter to arbitration. In that respect, the English Court of Appeal in **Sabbagh v Khoury & Others [2019] EWCA Civ 1219** upheld the principle that the statutory power of an English court to grant an injunction – which may be exercised not only to protect legal and equitable rights but also to prohibit vexatious and oppressive conduct – can be exercised to restrain arbitral proceedings, even where the arbitration is seated abroad. In particular, the Court held that the principle enshrined in section 1(c) of the English Arbitration Act 1996 that a court should not intervene in arbitral proceedings except as provided in statute does not *per se* prohibit an anti-arbitration injunction but it “*implies a need for caution, rather than an absolute prohibition*”. Hence, the court's power to grant such injunctive relief should only be exercised in exceptional circumstances, such as when the commencement or continuation of the arbitration proceedings would be oppressive and vexatious. Although the Court's analysis is premised on an interpretation of the applicable English legislation, it is expected that the Supreme Court of Mauritius will at least take guidance from the principles developed therein, especially as the provision in section 1(c) of the English Arbitration Act 1996 is derived from article 5 of the UNCITRAL Model Law on International Commercial Arbitration,

which is mirrored in the Mauritius International Arbitration Act.

Although it is not possible to identify exhaustively the “exceptional” circumstances in which an arbitration will or should be considered as oppressive and vexatious, in Sabbagh (supra), the English Court of Appeal considered that it was justified to grant an anti-arbitration injunction in respect of a claim which had been found, by virtue of an earlier determination of an English court, to be outside the scope of the arbitration agreement between the parties. Similarly, the English courts have previously restrained arbitration proceedings on the basis that it would be oppressive and vexatious for the party pursuing them to ignore an earlier determination that the arbitration agreement in question was invalid. However, the case for an anti-arbitration injunction may be made out even without a prior ruling on the scope or validity of the relevant arbitration agreement, for instance where such a determination is in the process of being made. In **Minister of Finance v IPIC [2019] EWCA Civ 2080**, the English Court of Appeal restrained arbitrations that had been commenced while court applications were on foot challenging a previous award under sections 67 and 68 of the English Arbitration Act 1996. Staying the court applications and allowing the arbitrations to continue – as the court of first instance had ruled – infringed the challenging parties’ rights to invoke the supervisory jurisdiction of the court. The arbitrations were also vexatious<sup>1</sup> in that any decision by the arbitrators as to their own jurisdiction (under the doctrine of *competence-competence*) would be provisional only, as the court would need to make a final determination in response to the applications. The Court considered these circumstances exceptional and restrained the arbitrations accordingly.

So far, the Supreme Court of Mauritius has not made any pronouncement on the exceptional circumstances that may lead to an anti-arbitration injunction. To our knowledge, the Court has however had the opportunity

to analyse the issue on at least two occasions. In an unreported matter earlier this year, the Judge in Chambers refused an *ex parte* application for an anti-arbitration injunction on the ground that in accordance with the *competence-competence* principle, the arbitral tribunal should first determine whether the dispute is arbitrable under Mauritius law; the Judge further refused to cause the matter to be called *inter partes* for submissions on the merits of the injunction application. Hence, in our view, the Judge’s dismissal of the anti-arbitration injunction by relying solely on the *competence-competence* concept shows a more, and in our view unduly, stringent application of that principle. A similar approach is observed in **Flashbird Limited v Compagnie de Sécurité Privée et Industrielle SARL [2018 SCJ 402]**, where the Court was asked to either set aside an award issued in a MARC arbitration or stay the enforcement of that award pending the determination by an ICC tribunal as to whether the latter, as opposed to the MARC arbitrator, had jurisdiction to determine the dispute between the parties. Allowing the ICC tribunal to make that determination would arguably be consistent with the *competence-competence* principle (notwithstanding that it might also undermine the finality of the MARC award). However, while the Court declined to set aside the MARC award, it did not go on to consider the merits of the alternative application (i.e. injunct the award creditor from enforcing it) on the basis of the *competence-competence* principle.

The purpose of this article is not to review the Mauritian decisions above. Suffice to say that they are missed opportunities to establish the position that would apply under Mauritius law as regards the exceptions to the *competence-competence* principle, irrespective of whether those exceptions would be successfully established in those cases. The courts’ pro-arbitration approach certainly benefits the development of Mauritius as a seat of arbitration, but they must

also embrace the sophistication of the non-interventionist principle, which is not absolute.



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<sup>1</sup>While in Sabbagh the Court considered whether arbitration would be “vexatious and oppressive”, in Minister of Finance it considered whether arbitration would be “vexatious, oppressive or unconscionable”.

# Consumer Arbitration Agreements

## *A comparative study of their enforceability under the French and Mauritian legal systems*

Arbitration as a mean to settle litigation has proven over and over again its efficiency, when it comes to complex business disputes, especially in an international context. The advantages of arbitration for the settlement of such disputes are well known: swiftness, confidentiality, effectiveness, technicity and the avoidance of the risk of partiality in some national jurisdictions.

As such, it has become common practice to include arbitration clauses in business agreements, more particularly in commercial agreements.

Sometimes, such clauses are also found in agreements with consumers.

Contracts with consumers are of a specific kind in the sense that one of the parties is pursuing a professional activity whereas the other one is buying a good or a service for its personal use (this is a common and acceptable definition of what is a Consumer Agreement in most countries). Indeed, most of these contracts provides for non-negotiable provisions: there are standardized clauses for all consumers and include general terms and conditions of sales. The whole point of consumer protection laws is to shield a party deemed vulnerable from a party deemed well versed in the matter and susceptible to abuse of its position.

We can see where this becomes an issue for arbitration as the whole point of arbitration is to allow parties to freely and equally chose to have recourse to an alternative mean of dispute resolution; not to be unilaterally forced into it by a co-contractor.

Therefore, it may be asked whether such arbitration agreement is valid and enforceable against a consumer?



In France and Mauritius, some matters like Consumer law have been remaining out of the scope of domestic arbitration for a long time (I). However, recent legal reforms tend to extend the scope of domestic arbitration, in particular towards consumers (II). Lastly, when it comes to international arbitration, there are specific rules provided for these peculiar agreements (III).

### **I. DISPUTES WITH CONSUMERS HAVE TRADITIONALLY REMAINED OUT OF THE SCOPE OF DOMESTIC ARBITRATION**

#### **Arbitration for consumers was originally prohibited in countries such as France...**

Indeed, the settlement of non-professional matters through arbitration remained expressly prohibited for a long time.

As such, the former Article 2061 of

the French *Civil Code* provided that an arbitration clause was to be considered valid as long as same was made within the context of a professional activity. Thus, professionals (and not only traders) could therefore use arbitration to settle a dispute, yet such a clause was neither valid nor enforceable against consumers.

#### **... and there is uncertainty about the same prohibition remaining in Mauritius.**

In Mauritius, Article 2061 of the Code Civil provides that an arbitration clause is null and void unless provided otherwise by law.

Notwithstanding the large scope of this prohibition in the Mauritian context, judges of the Supreme Court of Mauritius ingeniously found that the provisions of Article 2061 of the Code Civil shall be read in conjunction with Article 1003 of the *Code de Procédure Civile*<sup>1</sup>: *"The provisions of article 2061 are*

<sup>1</sup>Article 1003 of the Mauritian CPC: «La clause compromissoire est la convention par laquelle les parties à un contrat s'engagent à soumettre à l'arbitrage les litiges qui pourraient naître relativement à ce contrat ».



met by the article 1003 of the *Code de Procédure Civile*. Article 1003 which contains wide provisions covering any contractual situation in which parties have agreed to recourse to arbitration" (**Pillay and ors v. Apavou and ors 2005 SCJ 113**). As a consequence, the judges in the cited case law confirmed the validity of an arbitration clause included in an agreement relating to a sale of shares by "non-commerçants" (a non-trader) and which constitutes an "*acte mixte*" (a transaction with a non-trader).

However, Article 2060 of the Mauritian *Code Civil* prevents the parties from having recourse to arbitration in all the matters that relate to "*l'ordre public*". We would therefore be legitimate to ask: Do Consumer Agreements, and particularly Consumer matters, fall into the category of "*ordre public*"?

Like in many laws in Mauritius, laws relating to consumer protection are silent on the question of the arbitrability of disputes in this area.

## II. FRENCH RECENT REFORMS HAVE EXTENDED THE SCOPE OF DOMESTIC ARBITRATION TO DISPUTES WITH CONSUMERS

In France, following a recent reform in 2016, a compromise has been made between the extension of arbitrability and the protection of consumers. Now, Article 2061 of the French *Code Civil*<sup>2</sup> provides that, where a party has not entered into an agreement within the context of its professional activity, the latter could declare void the arbitration clause. Consumers may therefore decide to void the arbitration clause and constrain the other party to enter their claim before the competent jurisdiction, other than the designated arbitral tribunal. Conversely, the consumer could accept arbitration as a mode of dispute resolution.

Nevertheless, it is important to remember that, pursuant to article R. 212-2, 10° of the French *Code de la Consommation* and European law (See **EUCJ, 26 October 2006, « Claro », C-168/05**), arbitration clauses are placed in the "*grey list*" of clauses presumed abusive, until proven otherwise by the professional. As such, an arbitration clause that leaves no room for the consumer to elect for competent jurisdictions other than the arbitral tribunal may be considered as being abusive and null.

In other words, this extension of arbitrability to consumption matters offers new possibilities to consumers without depriving them in any way of their right to access national jurisdictions.

## III. INTERNATIONAL ARBITRATION IS NOT PROHIBITED FOR CONSUMERS

International arbitration has to be distinguished from domestic arbitration, as the rules are more flexible. For a long time in France, the courts have ruled that the prohibition of Article 2061 of the French Civil Code does not apply to international arbitration (**CA Paris, 7 novembre 1994, "Jaguar"; Cass. 1ère Civ., 21 mai 1997, n°95-11.429**), the only limitation to the enforceability of arbitration clauses being international public policy. Therefore, a dispute between a consumer and a professional, as long as it is qualified as an international dispute, is arbitrable. Though, another risk is left as French judges may consider that such arbitration clauses are abusive as regards the above-mentioned article R. 212-2, 10° of the *Code de la Consommation* (more particularly if they consider that this provision is an international public policy).

In Mauritius, Section 8 Of *The International Arbitration Act 2008* provides that an arbitration clause is enforceable where a contract contains an arbitration agreement and a person enters into that contract as a consumer, as long as such a consumer, by separate written agreement entered into after the dispute has arisen, certifies that, having read and understood the arbitration agreement, it agrees to be bound by it. This apply to every contract containing an arbitration agreement entered into in Mauritius even where the contract provides that it shall be governed by a law other than Mauritius law.

It is to be noted that compared to France, "*consumer*" has a different meaning in *the Mauritian International Arbitration Act*, as same refers to a natural person entering into a contract otherwise than as a trader, the other party to the contract entering into that contract as a trader. Thus, even a person that is acting within the context of its professional activities yet not as a trader shall confirm, after the dispute has arisen, to agree to be bound by the arbitration clause.



**PLCJ Team**  
*Mauritius*

<sup>2</sup>Article 2061 of the French *Code Civil*: « Lorsque l'une des parties n'a pas contracté dans le cadre de son activité professionnelle, la clause ne peut lui être opposée ».

# Retrospective of MARC

*for the year 2019*

- 1.** **11 January:** MARC45 event - Arbitration Spotlight with Prof. Daniel Cohen on 'How to Develop a Career in International Arbitration?'.
- 2.** **29 January:** MoU signed with the Mauritius Bar Association.
- 3.** **20 February:** Dipna Gunnoo, Head of MARC, was a guest speaker at the workshop on vessel registration and ancillary services organized by the EDB.
- 4.** **20 March:** MARC Seminar on Case Management in International Arbitration and Arbitrator Practice by Mr Niels Schiersing.
- 5.** **2 April:** Dipna Gunnoo spoke on the panel 'Regionalization of Arbitration in Africa: Perspective of Three Arbitration Centers (CAG, CIMAC, MARC)' during the Paris Arbitration Week. The French version of the MARC Arbitration Rules was launched during this event.
- 6.** **11 April:** Dipna Gunnoo participated in the panel discussion themed 'Mining the Giant of Africa', hosted by Mauritius Mining and Energy Club.
- 7.** **12 April:** MARC was one of the sponsors of the Golf Competition & Cocktail organized by the Mauritius Mining and Energy Club.
- 8.** **22 April:** MARC Seminar on 'The Most Favoured Nation Clause in Investment Arbitration' with Professor Malik Laazouzi.
- 9.** **26 April:** Signature of MoU with the Construction Industry Development Board.
- 10.** **10 - 14 June:** The Mauritius Arbitration Week focused on the theme 'Mauritius: a bridge between Africa and Asia'. This is the first time that MARC Conferences were held in both English and French.















# Retrospective of MARC *for the year 2019*



- 11.** **14 June:** Signature of MoU between the Mauritius Mining and Energy Club, MCCI and MARC.
- 12.** **17 June 2019:** Anjana Khemraz-Chikhuri, Deputy Registrar of MARC, spoke about the IORA dispute resolution project at the IORA Trade Modernisation Conference in Durban.
- 13.** **3 July:** Dipna Gunnoo was invited to speak at the Conference MCB- Institute of Finance entitled '*Médiation bancaire: Une Réalité*'.
- 14.** **4 July:** MARC was a knowledge partner of DREx Talks on 'Emergence of Transnational Responses to Corruption in International Arbitration', Paris.
- 15.** **30 – 31 July:** Dipna Gunnoo participated in a panel discussion on the Belt & Road initiative during the first annual forum on China-Africa Law (organized by Beijing Foreign Studies University Law School and the China-Africa Legal Research Institute in Beijing), which welcomed H.E. Judge Abdulqawi A. Yusuf (President of the International Court of Justice) as its keynote speaker. The Chinese version of the MARC Arbitration Rules was launched during this event.
- 16.** **29 – 30 August:** MARC was a strategic partner at The East Africa International Arbitration Conference 2019, Kenya, where Dipna Gunnoo spoke about 'Digitisation and Innovation in African Centres'. She also had the opportunity to be one of the five judges of the 1st edition of the African Arbitration Awards.
- 17.** **22 – 27 September:** Dipna Gunnoo participated at the International Bar Association (IBA) Annual Conference 2019, Seoul. She also paid a courtesy call on the director of the Korean Commercial Arbitration Board (KCAB) International, Mr Heehwan Kwon, to discuss about future collaborations.
- 18.** **25 – 27 September:** Anjana Khemraz-Chikhuri, spoke about "*Sécuriser les affaires dans la zone OI - Les atouts de la médiation et de l'arbitrage*" at the Forum Économique des Îles de l'Océan Indien 2019, Réunion Island.
- 19.** **29 October:** MARC organized a roundtable discussion, with the Association of Trust and Management Companies, the Financial Services Commission, the Global Finance Mauritius and the Mauritius Revenue Authority, on the latest EU decision which recognized Mauritius as a compliant jurisdiction with the EU Tax Good Governance Principles.



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# Mauritius Arbitration Week 2019



## Day 1: MARC Conference-Part I and Opening Cocktail



## Day 2: MARC Conference-Part II *I-ARB roundtable discussion hosted by Peeroo Chambers, ArbitralWomen Seminar, Charity Gala Dinner on the Beach and MARC45 Beach Gathering*





## Day 3:

*Breakfast Session hosted by BLC Robert & Associates, AfricArb Lunch and Seminar hosted by Reed Smith LLP, Afternoon Seminar hosted by PwC Legal, MARC45 Pub Quiz & Networking Cocktail*



## Day 4:

*Breakfast Session hosted by Keating Chambers and MCCI Business Club*



## Day 5:

*Breakfast Session hosted by Mining and Energy Club and MARC45 Seminar*







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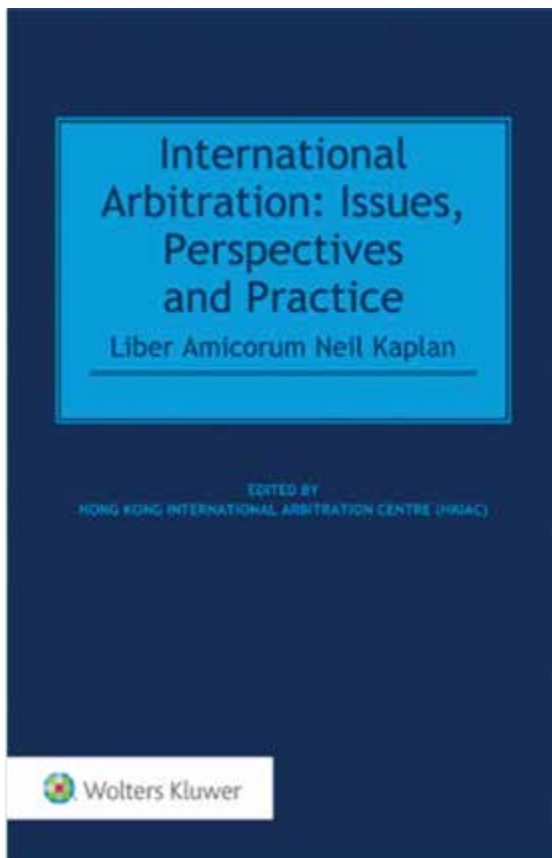
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# Book Review<sup>1</sup>: HKIAC (ed.), International Arbitration: Issues, Perspectives and Practice

*Liber Amicorum Neil Kaplan*

2019 Kluwer Law International BV



**F**or the uninitiated, a *liber amicorum* or *Festschrift* (literally, a 'book of friends') is a volume written by renowned specialists - colleagues, former pupils and friends - celebrating the life and work of an eminent person (living or deceased). In the field of international arbitration (both commercial and investor-State), this accolade has been accorded to a relatively small but illustrious number of leading lights. They include Eric Bergsten

(US), Robert Briner (Switzerland), Bernardo Cremades (Spain), Martin Domke (US), Pierre A Karrer (Switzerland), Michael Pryles (Australia), Pieter Sanders (the Netherlands) and Thomas W Wälde (Germany). To this gathering of luminaries may now be added Neil Kaplan CBE, QC, SBS, the undoubted father and indeed colossus of international arbitration in Hong Kong.

The depth and breadth of Mr Kaplan's involvement in international arbitration during the past 35 years - as a judge, arbitrator, academic, conference speaker, commentator and author,<sup>2</sup> as a Past Chairman of the HKIAC and as a Past President of the Chartered Institute of Arbitrators - has been unparalleled. Furthermore, given his influence throughout Asia and the fact that he remains very active in the field, this book, which has been assembled by a stellar array of contributors and published to celebrate his 75th birthday, casts a very wide net.

*Libri amicorum* or *Festschriften* normally contain only chapters written by colleagues, former pupils and friends of the person honoured. The subject-matter of such works can on occasions

be considered somewhat esoteric. This accusation cannot, however, be aimed at this book which, in this reviewer's opinion, will have a more general appeal to arbitrators, practitioners and academics by virtue of the depth and variety of its content. Indeed, this *liber amicorum* is value added, in the sense that it goes much further than usual by including a number of 'collected works' of Neil Kaplan.

The first of these 'collected works' is the Inaugural Kaplan Lecture of 2007, in which the speaker emphasised that the lecture series that would bear his name was "not intended to ape the Goff [L]ectures ... [but] "to be more practical and more Hong Kong focused". He was as good as his word in concentrating on a number of dispute resolution issues that were salient at the time (and in some cases remain so), including with regard to (1) party appointment of arbitrators to three-person tribunals; (2) achieving an appropriate mix of skills in tribunals; and (3) disclosure of documents. The book contains the text both of this lecture and of every subsequent Kaplan Lecture, up to and including that of 2017 - 11 in all, covering a broad spectrum of primarily international arbitration-related topics. A useful 'Introduction' by Mr Kaplan reviews each of the lectures and what has (or has not) changed in relation to their subject-matter in the years since they were delivered.<sup>3</sup>

<sup>1</sup>By Robert Morgan, 'Book Review: HKIAC (ed.), *International Arbitration: Issues, Perspectives and Practice – Liber Amicorum Neil Kaplan* (Wolters Kluwer, 2019)', in Romesh Weeramantry and John Choong (eds), *Asian Dispute Review*, (© Hong Kong International Arbitration Centre (HKIAC); Hong Kong International Arbitration Centre (HKIAC) 2019, Volume 21 Issue 2)pp.85-86.

<sup>2</sup>For an extensive list of Mr Kaplan's writings, lectures and judgments, see [www.neilkaplan.com](http://www.neilkaplan.com).

<sup>3</sup>The 'Introduction' (*After Thoughts from the Inaugural Kaplan Lecture*) and the lectures are comprised in, respectively, pp 1-6 incl and Part I (chapters 1-11 incl).

Part II of the book is devoted to chapters discussing a number of seminal arbitration-related decisions of Kaplan J (as he then was) that were critical to the development of Hong Kong as an arbitration-friendly jurisdiction (both as a seat and as a locus for enforcement) and as an arbitration centre. The discursive chapters are followed by chapters which comprise verbatim leading cases on international commercial arbitration in Hong Kong and concern (inter alia) (1) what makes an arbitration an international arbitration;<sup>4</sup> (2) what makes a judge 'arbitration-friendly' with regard to enforcement;<sup>5</sup> (3) waiver, good faith and the exercise of discretion in enforcing awards;<sup>6</sup> (4) pathological arbitration clauses;<sup>7</sup> (5) the distinction between expert determination and arbitration clauses;<sup>8</sup> and (6) the disapplication of the ancient doctrines of maintenance and champerty to arbitration, an early salvo in what would become the campaign to introduce third party funding of arbitration in Hong Kong.<sup>9</sup> These chapters and the judgments together effectively constitute a primer on several essential issues in arbitration in Hong Kong and Mr Kaplan's contributions to them. Part II also contains chapters discussing his forays into investor-State dispute settlement as presiding arbitrator in several arbitrations.

The book concludes with Part III, a diverse collection of seven chapters on arbitration in Africa, Australia, England, France, Hong Kong, Israel and Russia. The most topical are those on Hong Kong as a preferred seat for Belt and Road disputes by Fan Yang and on arbitration in Australia by Andrew Di Pasquale. Of particular interest for those interested in the history of arbitration are a chapter by Olga Boltenko on investor-State arbitration in Russia from Czarist times to the present, and one by Professor Derek Roebuck on private dispute resolution in eighteenth century England.

It is no exaggeration to say that the Kaplan Lectures and Mr Kaplan's judgments, both jointly and severally, have been catalysts for change in arbitration law and practice in Hong Kong and indeed beyond. There is no finer introduction to both the subject and the subject-matter.

This article was published by Wolters Kluwer, 2019



Book reviewed by:

**Robert MORGAN**

Consulting and Technical Editor

*Asian Dispute Review*

*Hong Kong*

<sup>4</sup>Fung Sang Trading Ltd v Kai Sun Sea Products and Food Co Ltd [1991] 2 HKC 526.

<sup>5</sup>J J Agro Industries (P) Ltd (a firm) v Texuna International Ltd [1992] 2 HKLR 391 and J J Agro Industries (P) Ltd (a firm) v Texuna International Ltd [1992] HKCFI 182.

<sup>6</sup>China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd [1994] 3 HKC 375 and Paklito Investment Ltd v Klockner East Asia Ltd [1993] 2 HKLR 39.

<sup>7</sup>Lucky-Goldstar International (HK) Ltd v Ng Moo Kee Engineering Ltd [1993] 1 HKC 404.

<sup>8</sup>Mayers v Dlugash [1994] 1 HKC 755.

<sup>9</sup>Cannonway Consultants Ltd v Kenworth Engineering Ltd [1995] 1 HKC 179.



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# Book Review<sup>1</sup>: Brödermann Eckart J., UNIDROIT Principles of International Commercial Contracts:

*An Article-by-Article Commentary*

2018 Kluwer Law International BV

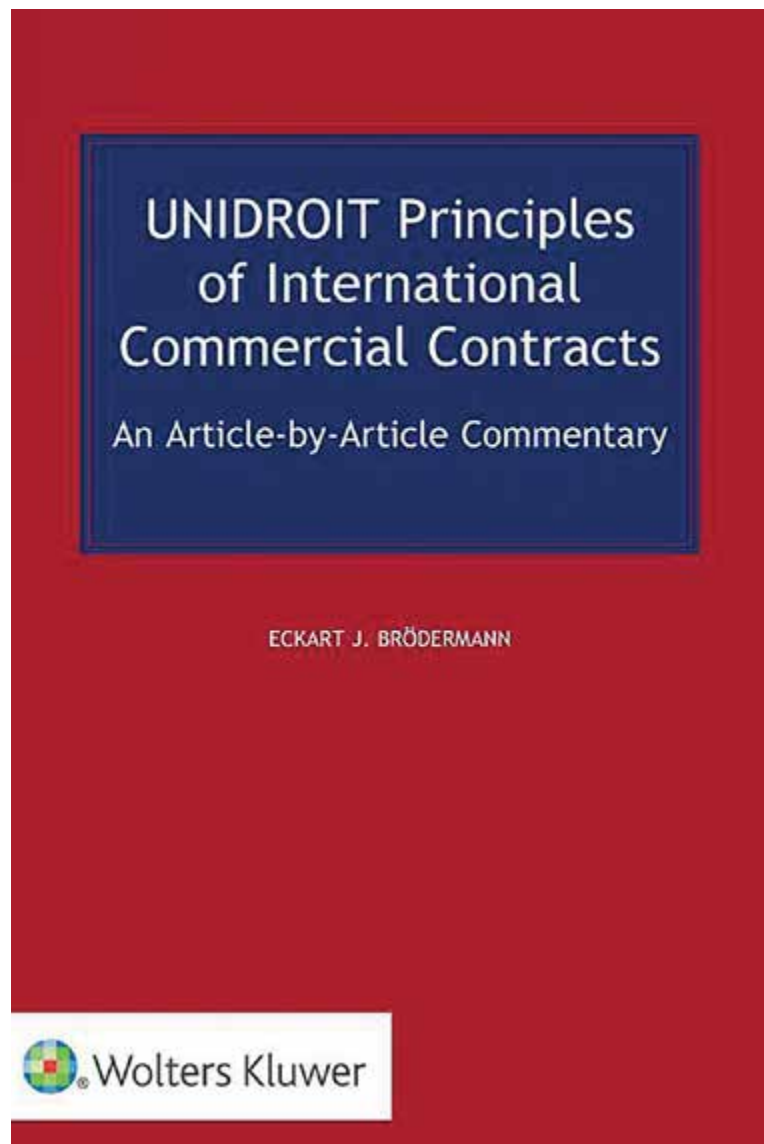
Upon receiving the above work authored by Professor Eckart Brödermann and published by Wolters Kluwer for review, I was instantly reminded of how important the choice of a neutral law could be in international contracts. As international arbitration practitioners, we often come across seats of arbitration that were chosen by parties purely because their neutrality. This same fundamental reason applies to the choice of arbitral institution or of the sole or presiding arbitrator. The objective is obviously to make sure that one party would not have an advantage over the other.

However, when it comes to choosing the law applicable to the international contract, we find that parties often adopt national laws. But choosing English law, for instance, would clearly go to the advantage of the party which comes from a common law system, and French law would put a civil lawyer in a better position. And even where both parties come from common law systems, we know that the common law of contract has evolved differently in many respects in different jurisdictions, so that one party may still not be as familiar with the applicable law as the other. The same applies to civil law systems inspired by the French Civil Code and other comparable systems.

The UNIDROIT Principles of International Commercial Contracts are a body of neutral rules of contract law prepared jointly by experts from various legal systems of the world. As such, they have been endorsed by the United Nations Commission on International Trade Law. They can certainly be described as being neutral as it is intended that their application would, in most cases, reach the result that would be expected under any law, and in the remaining cases,

reach a result that would not take any party by surprise.

Even where not expressly applicable, they have time and time again assisted counsel, arbitrators and judges to find solutions to questions on which the applicable contract law is silent.



<sup>1</sup>By Dr Jamsheed Peeroo (LLM Lond.; DEA Sorb.; PhD Sorb.) – Barrister and Arbitrator at 36 Stone, the 36 Group (London), and Head of Arbitration at Peeroo Chambers (Mauritius).

In using, interpreting or applying the fourth edition of the UNIDROIT Principles of 2016, one would typically have to refer to the preparatory work which led to the rules, including relating to its former editions, to UNIDROIT's "Official Comments", to academic articles, as well as, to available arbitral awards and judgments that have dealt with them. This is made easy by Professor Eckart Brödermann's work which consistently refers to these sources wherever relevant.

The reviewed work provides an excellent roadmap to dealing with the UNIDROIT Principles and, as such, is without any doubt the go-to book for doing so. Its structure is extremely accessible and user-friendly. It is arranged into chapters dealing individually with general topics of contract law, each featuring an article-by-article explanation and analysis. It also contains a table comparing all previous versions of the UNIDROIT Principles and a detailed Index.

The information provided in relation to each article is of both academic and practical value, clear and pertinent, and will prove to be extremely useful to a wide range of users. The author's profound

understanding of the background, objectives, travaux, and text of the UNIDROIT principles is felt when one reads his enlightening analysis. Finally, the language and style of the author makes this book enjoyable to read and to work with.

Therefore, this book has the dual purpose of serving as a complete textbook and as a commentary on the UNIDROIT Principles of International Commercial Contracts. It should most certainly take a prominent place on the bookshelves of every transactional lawyer drafting international contracts, of every international disputes lawyer or arbitrator and, of course, of contract law and private international law students and scholars.



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## Acknowledgements

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- > **All our MARC Insights sponsors** - without your support, help and belief in this project, the creation and achievement of this magazine would not have been possible!



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