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An International Arbitration Act
for South Africa



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To my father

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INTRODUCTION

When South Africa emerged from the era of isolation in 1994, it was faced with the fact that many of its laws relevant in the field of international trade and investment were outdated and inadequate. An obvious example is in the field of international arbitration. The problem is a serious one. Even though South Africa is a developing country (one of the richest countries in Africa) and provides everything an investor wants: mainly, a reliable political and juridical system and some great opportunities of business, the same investor is also interested in how a dispute arisen between parties is settled. In this matter; one can be surprised not to see any references to international arbitration in the South African regulations.

South African passed the Arbitration Act 42 of 1965 that was based mostly on the English Arbitration Act of 1950¹. Unfortunately, this law was designed for domestic arbitration and has no provision at all dealing with international arbitrations. This Act is perceived by those involved in international arbitration as being totally inadequate for this purpose².

Given the fact that countries like Nigeria, Kenya or Zimbabwe have regulations on international arbitration prove the interests of States to give the best conditions for investors (e.g. predictability of where and how a dispute will be settled if one occurs).

Focus will be on private arbitration (two private entities such as persons or corporations) and investor/state arbitration and will therefore not be on the Dispute Settlement Body of the WTO which settles disputes between states. Besides, the domestic arbitration regime will be put aside to concentrate on International Arbitration.

This paper will not deal either with the question of why there isn't such a regulation (the answer is certainly political) but with the necessary and beneficial content of an International Arbitration Act for South Africa.

To perfectly understand the matter at hand and narrow the study, it is important to define some terms such as Arbitration, Commercial and International.

¹ D.W. Butler & E. Finsen, *Southern Africa*, in *Arbitration in Africa*, Kluwer Law International, 1996, p.194

² R.H. Christie, *South Africa as a venue for international commercial arbitration*, *Arbitration International*, 1993

Definition of “Arbitration”

Arbitration is a private justice that is operated by the parties themselves. It is, therefore, a way of resolving disputes and according to Eric Robine, it is nowadays the generally accepted method of resolving international business disputes³.

The definition given by René David seems relevant because it contains a wide conception of the arbitrators’ missions: “Arbitration is a technique whereby the solution of a dispute between two or several persons is given by other persons –the arbitrators- who get their powers from a private convention and who rule on the basis of this agreement, without having been entrusted by the State”⁴.

The definition would not be complete if it was not said that the arbitral process leads to a final award, a binding decision, like a judgement. But unlike a judgment which is applicable *per se* by the parties (in France this characteristic is called Imperium), an arbitral award will need to get recognition and enforcement to be put into practice. The binding character of an award is an essential feature of Arbitration when parties have to choose between Arbitration and Mediation or Conciliation⁵.



Arbitration is part of the Alternative Dispute (ADR) like Conciliation and Mediation. They are said to be “alternative” in the way they are opposed to litigation which is the classical way to solve disputes. All the characteristics, differences and similarities will be seen later.

Arbitration expands rapidly in the countries of Common-Law since opinion in the countries of Civil law was very hostile to arbitration as being too primitive a form of justice. Even the Professor Philippe Fouchard, one of the most important thinker in the field said that it is an “apparently rudimentary method of settling disputes, since it consists of submitting them to ordinary individuals whose only qualifications is that of being chosen by the parties”⁶. Yet,

³ Eric Robine says that three factors have been particularly important in the development of International Commercial Arbitration: the modernisation of domestic legislation in many countries, specially developing ones, the development of institutional arbitration and the increased accession to international conventions. E. Robine, *The Evolution of International Commercial Arbitration over these past years (1990-1995)*, Revue de Droit des affaires internationales, 1996, n°2

⁴ R. David, *L’Arbitrage dans le Commerce International* («Arbitration in International Business»), *Economica*, 1982, p.9

⁵ A.A.Asouzu, *International Commercial Arbitration and African States*, Cambridge University Press, 2001, p.23 & 26

⁶ P. Fouchard, *L’Arbitrage Commercial International* («International Commercial Arbitration»), 1965, p. 30

the reluctance of the Civil Law system was not strong enough to prevent Arbitration from growing: in fact, nothing can be done to reduce its growth because it has been created within the business community, by them and for them.

This paper is to show why Arbitration is so successful among businessmen. One reason is that the arbitral process places the parties in its heart.

Whereas national judges have some rules to respect because they get their powers from the State, Arbitrators receive theirs from the parties whose hands are not tied at all. The Arbitration relies on an agreement between the parties: the Arbitration Clause which can be situated in the contract itself (parties agreed on this prior to the disputes) or can be another agreement (parties agreed to go on Arbitration after the disputed occurred)⁷.

Created by the parties, Arbitration evolved into the private justice the businessmen wanted.

Definition of “Commercial”

This precision in the expression *International Commercial Arbitration* comes from the Civil Law system which distinguishes between contracts that are commercial and those that are not⁸



The question is complicated because each country has its own definition of the word commercial. This can start with a very narrow definition such as “business made by merchants or traders in the ordinary course of their business”⁹ and goes to the guidelines given by the Model Law on Arbitration Rules provided by the UNCITRAL¹⁰

Common Law countries which do not distinguish civil and commercial matters have naturally a broader definition of Commercial than countries where Civil Law is the judicial system. In

⁷ J-M Jacquet & P. Delebecque, *Droit du Commerce International* («International Business and Investment Law»), 2002, 3rd ed. p. 398

⁸ A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell, 1999, p. 18

⁹ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 18

¹⁰ The Model Law states: “The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

any case, Countries will have to fix a definition of this term. That national definition will have great importance for some an efficient important use of International Conventions¹¹

The South African Arbitration Act 42 of 1965 does not define the word “commercial” but provides a definition of arbitrability (which is not the same thing, see *infra*). It is the domain of arbitration which, in the South Africa, excludes matters concerning matrimonial causes and those relating to status. This definition is classical since the matrimonial matters and the personal status are seldom included in the field of Arbitration.¹²

Definition of “International”

The term “International” is just used to differentiate between the national or domestic arbitration and the ones which “transcend” the boundaries because they involve more than just one country¹³

Several criteria can be used to determine whether the arbitration is international or not. Nevertheless, two main criteria are commonly used: the international nature of the dispute and the nationality of the parties.



The first system can be found in the ICC which states that the international nature of the arbitration does not mean that the parties must necessarily be of different nationalities¹⁴. Following this doctrine, two companies from the same country can have an international dispute (and then an international arbitration) if the performance of the contract is abroad.

The French Courts also apply that system as the New Civil Procedure Code, in its article 1492 provides that “an arbitration is international when it involves the interests of international trade”¹⁵. This criteria emphasises the economic reality of the situation: the judge must look at the whole operation to assess the internationality of the situation.

¹¹ For example: the article 1.3 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards also known as the commercial reservation allows each contracting party to limit its obligations “to contracts that are considered as commercial under its national law”.

¹² The matrimonial matters and the personal status are scarcely included in the field of Arbitration

¹³ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 12

¹⁴ *The International Solution to International Business Disputes* - ICC Arbitration, ICC Publications, n°301, 1977, p.19

¹⁵ The New Civil Procedure Code is available online but only in French <http://www.legifrance.gouv.fr/WAspad/RechercheSimpleArticleCode>

The other system considers as international an arbitration involving parties with different nationalities. However, in this system, other elements are taken into account: place of residence or place of business of the parties. It has been implemented in various countries like Switzerland¹⁶.

Finally, some systems have mixed the two above-mentioned criteria to use the economic reality of the operation and the nationality of the parties. Article 1(3) of the Model Law specifies the way to determine if arbitration is international or not. It first uses the nationality criteria¹⁷ but opens the door to the international dispute one¹⁸.

Although the South African government has more essential issues to settle (e.g. HIV/AIDS, Food, Poverty, Security,...), this paper aims to show that South Africa must pass this kind of regulations as soon as possible if it still wants to attract Foreign Direct Investments (FDI's). Indeed, since Africa is seen as a risky place, effective dispute resolution mechanisms are key to providing the trust and confidence a businessman requires to ensure trade¹⁹.

Examples of other developing countries which have implemented an international arbitration act will be very useful to strengthen the idea that arbitration plays a leading role to attract investors. Nigeria and Kenya will be some of the examples since they are African countries but Mexico might also prove of some relevance.

The first part of the study has three objectives: after having shown the advantages of Arbitration over Litigation and other Alternative Dispute Resolutions (ADR), this paper wants to demonstrate that Arbitration suits Africa's situation perfectly (lack of a judicial system, notably). Finally, the two types of arbitration (institutional with the ICC for example and *ad hoc*) and the content of the arbitration clause will be emphasized. The second part will establish the south African situation related to Arbitration and will point out the important problems the International Arbitration Act must tackle; for instance, the limitation of the courts' intervention and the respect of the parties' autonomy during the arbitration process. Some international instruments shall be examined such as the New York Convention for the

¹⁶ Chap. 12 of Swiss Private International Law Act

¹⁷ Art. 1(3)(a)

¹⁸ Art. 1(3)(b)(ii)

¹⁹ Q.Tannock, *Building the infrastructure for effective commercial dispute resolution in Southern Africa*, Colloquium on International Commercial Arbitration and African States held in London in June 2003

Recognition and Enforcement of Foreign Arbitral Awards (1958)²⁰ or the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)²¹. The existence of a set of regulations will not be enough and some other elements (Arbitration Centre and Investment Law) will have to be taken into considerations to attract FDIs.



²⁰ available at <http://www.uncitral.org/english/texts/arbitration/NY-conv.htm>

²¹ available at <http://www.worldbank.org/icsid/basicdoc-archive/9.htm>

OVERVIEW OF ARBITRATION

Chapter 1: The Characteristics of International Arbitration And Its Success

1.1. Arbitration as a form of Alternative Disputes Resolutions (ADR)

Arbitration has always been part of the ADR as opposed to Litigation²². Among ADR which is a very large category, the most well-known kinds are Negotiation, Mediation, Conciliation and Arbitration.

Negotiation means that parties facing a dispute decide to talk among themselves to resolve their conflict or to work out a compromise between them. This is the simplest and very often fastest way of solving commercial disputes because the parties know each other, their strengths and weaknesses. There is absolutely no legal formality and negotiation is the best way to preserve and maintain business relationship²³.

Mediation can be defined as a procedure in which a neutral intermediary, the mediator, at the request of the parties to a dispute and without the power to impose a settlement, endeavours to aid the parties in reaching a mutually satisfactory settlement on the basis of their respective interests²⁴. Whereas Litigation and Arbitration whereby one disputant lose and the other one wins, Mediation is a process commonly called a “win/win” procedure. This is because there is neither winner nor loser²⁵.

To some extent, Conciliation has a very similar definition. Three authors, Murray, Rau and Sherman consider that conciliation and mediation are sometimes used to describe the same process, that of involving a third party when neutral intervention is used to break a stalemate²⁶.

²² Litigation can be defined as the method to resolve disputes adopted by the courts of law as part of the system of justice established and administered by the State A. Redfern & M. Hunter, A. Redfern & M. Hunter, *Sweet and Maxwell*, 1999, p.32

²³ M. Wang, *Are Alternative Dispute Resolution Methods superior to Litigation in Resolving Disputes in International Commerce?*, Arbitration International, 2000, Vol.16, N°2

²⁴ Intellectual Property, Reading material of World Intellectual Property Organization, 1998, p.226, WIPO Publication

²⁵ Both parties win in reaching an agreement and saving their relationship: A.A.Asouzu, Cambridge University Press, 2001, p.19

²⁶ Murray, Rau & Sherman, *Process of Dispute Resolution*, Westbury Foundation, 1996, p.293-294. It is striking to note that the *Webster's Unabridged Dictionary* (3rd Edition, 1976) includes the word “mediation” in defining “conciliation” and uses “conciliation” to define “mediation”.

However, some people consider that mediation denotes a more formal procedure than conciliation where the third party will be less active: a conciliator will not make any recommendations whereas the mediator is encouraged to do so²⁷.

Arbitration whose definition has already been given above has some similarities with Mediation or Conciliation (notably, the intervention of a third party whereas Negotiation which can be seen as another ADR only involves the parties). Moreover, it is a duty for the arbitrator to first try to reconcile the two parties²⁸.

Nevertheless, the main difference is obviously that mediation is not binding whereas arbitration is binding. In fact, mediations lead to agreements and arbitrations end with final decisions, quite similar to judgement²⁹. The way the decision is implemented will therefore be completely different between Mediation where the agreement will be fast to apply if parties show good will and Arbitration where the award will need recognition and enforcement in the relevant countries.

Choosing Mediation means that parties want to have flexibility because they are completely free during all the process. They are allowed to choose the power of the mediator between evaluator (the mediator offers an evaluation of the dispute and suggest an appropriate outcome) and facilitator (he or she seeks to facilitate communication between the parties and to help each of them to understand the other's point of view), they can choose the rules of evidence and stop the procedure anytime they want³⁰.

Arbitration on the contrary calls for the application of certain rules concerning the rules of evidence and procedure (especially if they have chosen institutional arbitration). Even if the parties lose a bit of their powers over the process (they have particularly no control over the final decision after having transferred it to the arbitrators³¹), they are still hugely involved in

²⁷ The Chartered Institute of Arbitrators, *Guidelines for Conciliation and Mediation*, 1990 edn

²⁸ P. Fouchard, «International Commercial Arbitration», 1965, p. 17-18. The ICC rules provide this kind of provision for a long time now (Art. 26)

²⁹ Intellectual Property, Reading material of World Intellectual Property Organization, 1998, p; 226, WIPO Publication: "it says that the arbitral award is final" and Alessandra Sgubini, Mara Prieditis and Andrea Marighett (In *Arbitration, Mediation and Conciliation: differences and similarities from an International and Italian business perspective*, 2004, Bridge Mediation) precise that the arbitral award have the same value as an ordinary judicial judgement.

³⁰ *ibid*

³¹ Alessandra Sgubini, Mara Prieditis and Andrea Marighett, 2004, Bridge Mediation

the resolution of their dispute compared to litigation. Besides, losing some powers to the arbitrator is the game to play if you want a final award. Finally, concerning the applicable law, Francis Gurry says that arbitrators must apply the law whereas mediators can take other interest (such as equity) into account³². This idea is not so clear because a lot of regulations, both domestic (art.1474, NCPC in France³³) or international (Art.17 (2 & 3) of the rules of arbitration of the International Chamber of Commerce³⁴), accept that arbitrators assume the power of an *amiable compositeur* or use relevant trade usages.

1.2. Why Arbitrate in Africa?

In this section, focus will be made on the interest to arbitrate rather than to conciliate or plead in front of the national courts. The African continent will be the main example.

1.2.1. The Drawbacks of the other Dispute Resolution Methods

1.2.1.1. The Weakness of Negotiation

Negotiation can be the best way to solve disputes when the parties are willing to save their business relations. It is a “soft approach”³⁵ which could suits the African culture because of its faculty to maintain harmony and good relationships between people. However, Negotiation can be really difficult to implement since it depends largely on the willingness of the parties to save the contract and its performance. The parties need to be detached and as objective as possible about the issues. They should be ready to communicate and compromise although parties to a dispute often have hard feelings towards each other³⁶.

Moreover, parties most of the time come from different cultures, especially in the way of conducting Negotiations³⁷. Finally, Negotiation must be avoided when it involves parties of unequal strength as the content of the outcome might be unfair to the weakest party³⁸.

³² F. Gurry, *The Dispute Resolution Services of the World Intellectual Property Organization*, Journal of International Economic Law, 1999, p.386

³³<http://www.legifrance.gouv.fr/WAspad/RechercheSimpleArticleCode?code=CPROCIV0.rcv&art=1474&indice=2>

³⁴ available at http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf

³⁵ M. Wang, *Arbitration International*, 2000, Vol.16, N°2

³⁶ *ibid*

³⁷ Businessmen from the United-States or Western Europe complain that the Japanese (the Asian, in fact) “Yes” does not really mean yes. On the opposite side, Japanese negotiators do not like the American style of negotiation which is too aggressive: Y. Taniguchi, *The Changing Attitude to International Commercial Dispute Settlement in Asia and the Far East*, *Arbitration and Dispute Resolution Law Journal*, June 1997, p.73

³⁸ M. Palmer & S. Roberts, *Dispute Processes: ADR and the Primary Forms of Decision Making*, London:Butterworths,1998, p.71

1.2.1.2. The Weakness of Conciliation

Conciliation is a widely used method to settle disputes in Africa. The African social values and family cohesion calls for a dispute settlement process that fits with these features and ensures economic and social progress³⁹. Besides, the simple and flexible nature of Conciliation is appropriate for the settlement of commercial disputes on the African continent⁴⁰

As stated by P.E.K Quashigah: “In traditional Africa, the struggle towards existence makes it imperative for the members to always cooperate in almost all daily endeavours. Two disputes litigants today, together with the judge or judges will, tomorrow, have to cooperate in tilling the farm or hunting”⁴¹.

Nevertheless, Conciliation like any type of ADR will start only if the parties agree to conciliate⁴². However either of the two disputants can easily delay the process. In this case, it is going to be a waste of time and money⁴³.

One of the main drawbacks in choosing a Conciliation procedure is in its outcome if it works: the settlement agreement. Some authors believe that its implementation would be problematic in the absence of voluntary compliance⁴⁴. However other opinions advocate that parties would be more satisfied with this outcome compared with their potential attitude towards a court judgement and therefore as they have been involved through all the process would become psychologically bound to respect the terms of their resolution⁴⁵.

In addition, the settlement agreement *per se* can not take advantage of the international enforcement under arbitration conventions such as the New York Convention (1958) or the

³⁹ A.A.Asouzu, Cambridge University Press, 2001, p.15-16

⁴⁰ *ibid*, p.21

⁴¹ P.E.K Quashigah, *Reflections on the Judicial Process in Traditional Africa*, Nigerian Juridical Review, 1988-1990, N°4, p.1

⁴² A. Redfern & M. Hunter Sweet and Maxwell, 1999, p. 35, see also A. A. Asouzu, Cambridge University Press, 2001, p.22

⁴³ *ibid*, p.42

⁴⁴ A.A.Asouzu, Cambridge University Press, 2001, p.22. The author raises a big issue since the conciliator has no power over the solution found by the parties (see M. Wang., *Arbitration International*, 2000, Vol.16, N°2)

⁴⁵ M. Wang., *Arbitration International*, 2000, Vol.16, N°2

Washington Convention (1965) which created the International Centre for Settlement of Investment Disputes (ICSID)⁴⁶, unless they are obtained in the context of Arbitration⁴⁷.

Some national laws to avoid this problem of enforcement have even given to the settlement agreement the same status and effect as an arbitral award: it is the case of India⁴⁸ and Uganda⁴⁹. Nonetheless, this kind of provision has a geographically limited effect inside the boundaries of the countries' authority. This provision does not make the settlement agreement enforceable outside the countries where this provision is enacted. A foreign court asked to enforce this type of "award" will follow its own national law which may well prohibit a settlement agreement to be enforced under such Conventions.

It is interesting to note that the South African Law Commission in its 1998 report on an International Arbitration Act stipulates that a settlement agreement in writing arising out of Conciliation in the context of an arbitration agreement shall be enforced in South Africa as an arbitral award⁵⁰.

Even though some countries have tried to help the implementation of the settlement agreement, the idea of an International Convention on the enforcement of settlement agreements appeared during the 1980's. Yet, such a Convention would have been completely contrary to the spirit, nature and purpose of Conciliation. A working group which worked on this Convention notably stated that: "some reservations were expressed concerning this idea, particularly because it might overly formalize an essentially informal process"⁵¹.

It is absurd to enforce a settlement agreement whereas in this kind of situation, there is neither winner, nor loser⁵². The drafting of such a Convention might have spawned cases of refusal which is against the very nature of Conciliation and the enforcement might have involved costs and time, antagonised the parties and involved procedural obstacles⁵³.

⁴⁶ The analysis of these two Conventions will be seen in the second part of this paper.

⁴⁷ A.A.Asouzu, Cambridge University Press, 2001, p.22

⁴⁸ Arbitration and Conciliation Act of India 1996, sec. 30(3), (4) et 70

⁴⁹ Arbitration and Conciliation Act of Uganda 2000, sec. 31(3)

⁵⁰ South African Law Commission, *Arbitration: an International Arbitration Act for South Africa*, 1998, §2.91-2.92, p.44

⁵¹ Sanders (gen. ed.), International Council for Commercial Arbitration, *ICCA Congress Series N°1*, p.267

⁵² A.A.Asouzu, Cambridge University Press, 2001, p.24

⁵³ G. Hermann, *Conciliation as a New Method of Dispute Settlement* in Sanders (gen. Ed.), *ICCA Congress Series n°1*, p. 145, 159, 164

In fact, if a party with a settlement agreement faces difficulties from the other party to apply the outcome of the Conciliation, the only way to solve this deadlock is to bring the action to courts claiming a breach of the settlement agreement by the other party⁵⁴.

To sum it up, one can say that Conciliation is not the perfect way to settle disputes as it lacks binding effect⁵⁵ and an easy enforceability⁵⁶.

1.2.1.3. The shortcomings of Litigation

Litigation is the most classical and formal way to solve disputes⁵⁷. However, Litigation has serious drawbacks objectively when one has to compare with Arbitration. The comparison between Litigation and Domestic Arbitration are quite balanced (parties are from the same country with the same culture and a judicial system they both know). In fact, it will depend mainly on the reputation and procedures of the local courts⁵⁸.

But, when it comes to comparing with International Arbitration, Litigation raises some serious issues:

-Firstly, the national courts have been said to emphasise too much the rights and prerogatives of the parties and to reduce to almost nothing parties' business relationships⁵⁹. National Courts apply the Law without taking into account the commercial issues. According to M. Fulton: "once a dispute enters the courtroom, it is transformed and the commercial realities of the dispute are translated into legal issues"⁶⁰.

-Secondly, Litigation has always been seen as reflecting more the interests of the State and the values of the judges and legal practitioners rather than the interests and values of the parties⁶¹.

-Thirdly, in an international dispute, neither of the parties wants to go in the other party's country to litigate. Each party (especially the investor) wants to avoid the uncertainty⁶² of a

⁵⁴ M. Wang,, Arbitration International, 2000, Vol.16, N°2

⁵⁵ A.A.Asouzu, Cambridge University Press, 2001, p.26 and M. Wang,, Arbitration International, 2000, Vol.16, N°2

⁵⁶ *ibid*, p.26

⁵⁷ M. Wang,, Arbitration International, 2000, Vol.16, N°2

⁵⁸ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 26

⁵⁹ M. Wang,, Arbitration International, 2000, Vol.16, N°2

⁶⁰ M. Fulton, *Commercial Alternative Dispute Resolution*, LBC, 1989, p.42

⁶¹ *ibid*, p.12

⁶² Uncertainty occurs when the judicial system is failing (This was one of the reason why Arbitration was developed in Mozambique: D.W.Butler, *The State of International Commercial Arbitration In Southern Africa: Tangible yet Tantalizing Progress*, Journal of International Arbitration, 2004, Vol.21, N°2), when corruption is present, when the limits between the national courts and the executive or the legislative are blur and can prevent them from getting a judgement in their favour because impartiality and independence is not assured: J. Paulsson,

forum which could be unpredictable, partial and ineffective and could jeopardize international trade and investment⁶³.

-Last but not least, investors do not want to face the situation where the judge has the courage to take a decision against the government, decision which will be dismissed by a law⁶⁴. This last remark is particularly relevant in African countries which have the reputation of unreliability as far as their judicial systems⁶⁵ are concerned. It is not the viewpoint of a Nigerian lecturer who believes that African courts can be trusted (he, notably, gives the example of a Nigerian judgement who ruled that the government misconducted itself deliberately against a hospital⁶⁶ and another one about an American Court which dismissed the claim of an applicant who said that he would receive unfavourable treatment in the Nigerian Courts⁶⁷). Although Africa has tremendous problems and especially some African countries, nobody helps in telling and giving credence to such beliefs about Africa⁶⁸. Even if those issues exist, practitioners make the rules and fuel all this negative ideas about Africa.

In fact, between Litigation on the one hand and Negotiation and Conciliation on the other hand, there is Arbitration which can be a good viable way to resolve disputes if it is well organized and administered. As A.A.Asouzu states: “Arbitration [is] the least of four evils”⁶⁹.



1.2.2. The situation in Africa, positive ground for Arbitration

Africa is the poorest continent by far. It is the least developed and the weakest economically⁷⁰ as well. Its external debt burden for instance is incredibly huge (in the 1990's, it was estimated to be around US\$250 billion⁷¹).

Third World Participation in International Investment Arbitration, ICSID Review-Foreign Investment Law Journal, 1987, N°2, pp.19 & 44-45, this statement gains some authority when an African citizen says so: Augustus.A. Agyemang, *African Courts, the Settlement of Investment Disputes and the Enforcement of Awards*, Journal of African Law, 1989, N°33, p.31)

⁶³ W.W. Park, *Bridging the Gap in Forum Selection*, Transnational Law & Contemporary Problems, 1998, N°8, p.19,26

⁶⁴ F. Gurry, Journal of International Economic Law, 1999, p.386

⁶⁵ see footnote 52

⁶⁶ *Obeya v. A-G (Federation) and Anor*, 1987 3 Nigerian Weekly Law Reports (Pt 60) p.325

⁶⁷ *Caribbean Trading and Fidelity Corp v. NNPC*, US District Court, New York, International Arbitration Report, 1991 Vol.6, N°2, F-1

⁶⁸ A.A.Asouzu, Cambridge University Press, 2001, p.35-40 and P. Chabal stated: “indeed, it is unfortunately the case that much of what we hear about Africa’s predicament is true. The point I want to make is simply that, however truly awful Africa’s fate may be today, we need not resort either to myth-making or tautologically parochial explanations”, *Democracy and Daily life in Black Africa*, London: Hurst, 1977, pp.225-226

⁶⁹ *ibid*, p.26

⁷⁰ *ibid*, p.27

⁷¹ OAU, *Fundamental Changes Taking Place in the World and their Implication for Africa*, Report of the Secretary-General to the 26th Ordinary Session of the Assembly of the Heads of State and Governments, 6 July 1990

Africa faces different kinds of problems: political instability, lack of good governance, presence of unaccountable governments, corruption and finally different conflicts (military, of course but conflicts of internal politics as well)⁷². Moreover, Africa relies too much on external aid⁷³.

One of the trends in Africa was the importance of the States in the trade and business sectors. The people used to consider the State not only as a defender of the territory and a provider of security but also as a manager of resources, as a promoter in development and someone supposed to raise their standards of living. Therefore, the activities and intervention of the State have increased and been hugely extended⁷⁴.

The prominence of the State and its influence in business and economic life certainly had an influence of the non-development of Arbitration in Africa⁷⁵. The presence of the State or one of its agencies in an international contract brings a lot of difficulties and problems. The administrative part is more important and generally slows down all the performance of the contract, from the negotiations to the very last performance or any dispute⁷⁶.

Because the involvement States had some negative effects on the development of Foreign Direct Investments (FDI) in Africa and other developing countries, the World Bank, the International Monetary Fund (IMF) and creditor states have implemented the Structural Adjustment Programmes (SAPs) which allowed for waves of privatisations. Therefore the entrance of private investors was possible even in some key sectors such as the oil industry⁷⁷. However, some privatisations were organised in an indiscriminate way with terrible consequences on the society embraced (unemployment, notably) making “the rich, richer and the poor, poorer”⁷⁸.

⁷² I.L. Griffiths, *The African Inheritance*, London:Routledge, 1995

⁷³ J. Sachs, *Growth in Africa*, *The Economist*, 29 June 1996, pp.25-26

⁷⁴ A.A. Asouzu, Cambridge University Press, 2001, p.29

⁷⁵ E. Cotran & A. Amissah, *Arbitration in Africa*, The Hague: Kluwer Law, 1996, pp.10-11

⁷⁶ J.P. Carver, *The Strengths and Weaknesses of International Arbitration Involving a State*, *Arbitration International*, 1985, N°2, p.179

⁷⁷ A.A. Asouzu, Cambridge University Press, 2001, p.29

⁷⁸ P. Gibbon, *The World Bank and African Poverty*, *Journal of Modern African Studies*, 1992, p.193 or S.P. Schatz, *The World Bank's Fundamental Misconception in Africa*, *Journal of Modern African Studies*, 1996, p.239

The balance between the interests of investors and those of the States is hard to find. On the one hand, investors need and want maximum security and a stable environment for a fruitful realization of its primary objectives⁷⁹. On the other hand, the host African country needs and wants the highest liberty of action on the regulations over investments in order to bring them in line with its other policy goals (eg: fiscal, economic, social, etc...)⁸⁰.

In addition to the suspicion over the impartiality and independence of African courts, different kinds of legal system are applied in Africa such as the common law, the Roman-Dutch law, the civil law, the Islamic law and customary law systems. It has been pointed out that this aspect of the African judicial system was reinforcing the attraction for Arbitration⁸¹ which affords a neutral mechanism concerning the procedure for resolution of disputes⁸². If the parties manage to agree on an arbitral procedure, they will be able to avoid the maze that national procedure may prove to be.

Finally, it is essential to see disputes as a normal part of any legal relationships: in fact they are inevitable⁸³. Given this situation, the issue is not how to eradicate disputes in international trade but more how to supply for efficient and equitable methods in resolving controversies⁸⁴. Arbitration can be the perfect way as Litigation is still a bit mistrusted and the judicial system complex.

There must not be a misunderstanding: National Courts have and will have an important role to play whether Arbitration works or not in Africa. They are completely complementary⁸⁵. National Courts will be useful to enforce and recognize foreign arbitral awards as lots of African countries have signed International Conventions on enforcement and recognition of foreign arbitral awards (notably, The New York Convention of 1958)⁸⁶. An efficient judicial

⁷⁹ R. Higgins, *Pre-Conditions for Foreign Investment*, Energy Law (IBA), Topic 3, 1986, 3

⁸⁰ A.A.Asouzu, Cambridge University Press, 2001, p.31

⁸¹ Sampson L. Sempasa, *Obstacles to International Commercial Arbitration in African Countries*, International and Comparative Law Quarterly, 1992, p.387

⁸² W.W. Park, *Illusion and Reality in International Forum Selection*, Texas Journal of International Law, 1995, p.135

⁸³ M. Philippe-Gazon, *Role of the ICC International Court of Arbitration*, International Business Law Journal, N°4, 1997, p.443

⁸⁴ A.A.Asouzu, Cambridge University Press, 2001, p.32

⁸⁵ *ibid*, p.43

⁸⁶ S.Azadon Tiewul & Francis A. Tsegah, *Arbitration and the Settlement of Commercial Disputes: A Selective Survey of African Practice*, International and Comparative Law Quarterly, 1975, p.395

system will preclude Arbitration abuse and provide support and control⁸⁷. In any case, a reliable judicial system will be essential if the parties prefer to litigate or when the subject-matter of the dispute is out of the scope of Arbitration under the law of a state⁸⁸.

Yet, arbitration is a perfect tool to attract investors on a given territory. In commercial contracts, it allows to avoid national Courts and provides flexibility and neutrality. No doubt that FDIs spawn economic development which, coupled with Human Rights commitments⁸⁹, can give more strength to Democracies in African countries. As stated by S.A. Wako: “If there is no sustained economic development in developing countries, then the fragile new democracies will be threatened by enormous economic, social and cultural difficulties and complexities and these in turn will pose a grave danger to the rule of law”⁹⁰.

African States should therefore put in place an efficient judiciary system to back the development of Arbitration⁹¹. Concerning South Africa, this country has the chance compared to other countries on the African continent to have a very good judicial system that one can trust. However, the drawbacks of Litigation are still present (formalism, lack of neutrality) and the initiation of Arbitration is more important than ever.



1.2.3. The advantages of Arbitration over Litigation

This paper has already pointed out the drawbacks of Litigation. These drawbacks could be called objective drawbacks because they do not depend on parties' intervention. This part will focus on the subjective advantages of Arbitration over Litigation.

1.2.3.1. Speed of Resolution

Litigation is inconvenient because it is too slow⁹². Parties in a commercial relationship need to see their conflicts solved rapidly⁹³. The approximate time-frame for each dispute resolution

⁸⁷ A.A.Asouzu, Cambridge University Press, 2001, p.43

⁸⁸ *ibid*, p.43

⁸⁹ U.O. Umozuruike, *The African Charter on Human and People's Rights*, American Journal of International Law, 1983, p.902

⁹⁰ S.A. Wako, *The Rule of Law: Corner stone of Economic Progress*, International Business Lawyer, 1995, pp.350-353 but see also for an opposite viewpoint: I.F.Ibrahim Shihata, *Democracy and Development*, ICLQ, 1997, p.635

⁹¹ A.A.Asouzu, Cambridge University Press, 2001, p.43-44

⁹² D. Samuels and N. Smith, *Inside Asia's Courts*, International Commercial Litigation, April 1997. In §23, the authors precise that in 1996, in India, “there were apparently 25 million authentic cases waiting to be heard; some of which have now been waiting more than 12 years”.

⁹³ M. Philippe-Gazon, *International Business Law Journal*, N°4, 1997, p.444

mechanism is 3 to 6 months for Arbitration⁹⁴ and 18 months to 3 years for Litigation⁹⁵. Arbitration therefore appears to be a quicker method to solve international commercial disputes. There are mainly two reasons to explain that: firstly, unlike Litigation where the procedure to follow is essential but unfortunately complex, binding and confusing, Arbitration enables the parties to choose and control their own procedure⁹⁶ which will be simpler, of course. Secondly, the parties who can choose their arbitrators will avoid judges who have poor knowledge in technical and complex matters. Having one arbitrator who knows the area or industry of the relevant dispute will sometimes preclude from the intervention of experts who slow down the process⁹⁷. However, experts can be useful even in Arbitration.

1.2.3.2. Costs

The fact that Arbitration is cheaper than Litigations is not denied. However, with the success of Arbitration its development and the professionalism of its practice⁹⁸, the gap between costs of arbitration and litigation is closing, especially in international disputes. In fact, both involve costs (in Litigation, the lawyer's fees, filing fees, litigation infrastructure travelling costs, at least for one of the disputant and translations or experts' reports whereas in Arbitration, the lawyer's fees, travelling and accommodation costs, arbitrator's fees and accommodation, expenses for hiring of hearing rooms, translations or experts' reports⁹⁹) which are roughly the same.

Nevertheless, Litigation can become a more expensive way than Arbitration if the judicial system applies the principle that the losing party is to pay the costs of the winning party (Australia, for instance). In addition to that, Arbitration is usually shorter than Litigation and

⁹⁴ For Instance, art.24 of the 1998 ICC rules provides for a period of 6 months the appointment of the arbitrators to the final award

⁹⁵ R. Collins, *Alternative Dispute Resolution – Choosing the Best Settlement Option*, Australian Construction Law Newsletter, 1989, N°3 at 3. These figures do not take into account a possible appeal and are particularly true in Africa where congestion and delay, in courtrooms, are common (S.A. Tiewul & F.A. Tsegah,, *International and Comparative Law Quarterly*, 1975, p.395-396)

⁹⁶ M. Wang,, *Arbitration International*, 2000, Vol.16, N°2

⁹⁷ Jeffrey D. Watkiss, *Considerations Affecting the Choice between Litigation, Arbitration or Mediation of Natural Gas Disputes*, 1-2, (paper presented at the International Conference on the Settlement of Energy, Petroleum and Gas Disputes, Cairo, Egypt, 18-19 November 1995)

⁹⁸ Andrew I. Okekeifere, *Commercial Arbitration as the most effective Dispute Resolution Method: Still a Fact or Now a Myth?*, *Journal of International Arbitration*, December 1998, p.88

⁹⁹ *ibid*

the necessary costs may be reduced substantially¹⁰⁰. Finally, most of the time, the parties will ensure that they will share all the costs related to Arbitration, pending the final award¹⁰¹.

In Africa, the choice between Arbitration and Litigation must be well assessed because if Litigation has terrible drawbacks, Arbitration will be synonymous with huge expenses notably if the proceedings are held abroad with arbitrators and counsels' fees which have to be paid in stronger currencies than the local ones.

1.2.3.3. Confidentiality and Privacy

Often, parties to a dispute want to have their commercial dispute confidential and private. This wish is not possible in Litigation where the hearings are public whereas Arbitration fulfils completely this desire¹⁰². Confidentiality and Privacy are still important advantages of Arbitration over Litigation¹⁰³.

Some Arbitration proceedings imply important contracts and involve colossal sums of money and it is easy to understand why the parties want confidentiality. Privacy is such an essential feature that parties who disclose some information can face penalties and legal repercussions¹⁰⁴. Despite the importance of Confidentiality, some limits exist: the award can be published if the parties both agree or a public company may have to disclose to its shareholders the fact that Arbitration is taking place and of course the outcome of the award¹⁰⁵.

1.2.3.4. Flexibility

In Litigation, judges have to follow rules of procedure (the best examples are the proof of facts, the language in which the trial is held,...) which can be confusing and time-consuming¹⁰⁶. As already stated, the judge will follow the law and nothing but the law.

¹⁰⁰ M. Wang,, Arbitration International, 2000, Vol.16, N°2

¹⁰¹ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 405

¹⁰² L.Trakman, *Confidentiality in International Commercial Arbitration*, Arbitration International, 2000, Vol.18, pp.1-3

¹⁰³ It is with no doubt one of the most sought-after characteristics of Arbitration in practice; see the expert Report of Stephen Bond (a former Secretary-General of the ICC) in *Esso/BHP v. Plowman*, Arbitration International, 1995, N°8 at 273

¹⁰⁴ M. Wang,, Arbitration International, 2000, Vol.16, N°2

¹⁰⁵ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 27

¹⁰⁶ M. Wang,, Arbitration International, 2000, Vol.16, N°2

On the contrary, “In arbitration, through flexibility, the law is made for the man and not man for the law”¹⁰⁷. Indeed, thanks to the flexibility granted by Arbitration, procedures can suit perfectly the need of the parties in relation to the complexity, the size and the nature of the dispute¹⁰⁸. Last but not least, as opposed to national courts which are bound by legal remedies and principles, Arbitration is the suitable forum to seek more adequate remedies and relevant solutions¹⁰⁹.

Like confidentiality, flexibility in Arbitration is a massive advantage compared with Litigation.

1.2.3.5. Fairness

This question amounts to mentioning again the lack of independence of the national courts¹¹⁰. On the other hand, Arbitration appears to be fairer as the parties appoint, by consensus, their own arbitrators and keep the control over the whole process (especially in an *ad hoc* Arbitration)¹¹¹.

Nevertheless, in a procedure involving two parties with different bargaining powers, neither Arbitration nor Litigation manage to lessen this imbalance of power. The stronger party will be able to afford the best counsels whereas the weaker one will have to rely on its intelligence¹¹².

1.2.3.6. Effectiveness

Effectiveness will be ensured if the winning party can execute the award or the judgement.

Concerning judgements, every country has its own rules and laws to decide whether or not a foreign judgement can be recognized and enforced in its territory¹¹³. This system is

¹⁰⁷ A.I. Okekeifere, *Journal of International Arbitration*, December 1998, p.90-91

¹⁰⁸ They can choose the time-frame of the procedure, the regime of evidence, the location which will be neutral in most of the case, the language of the process: M. Wang,, *Arbitration International*, 2000, Vol.16, N°2 and A.I. Okekeifere, *Journal of International Arbitration*, December 1998, p.89-90

¹⁰⁹ M. Wang,, *Arbitration International*, 2000, Vol.16, N°2

¹¹⁰ A.A. Agyemang, *Journal of African Law*, 1989, N°33, p.31

¹¹¹ D.J. Branson, *Ethics for International Arbitrators*, *Arbitration International*, 1987, N°1

¹¹² Wang,, *Arbitration International*, 2000, Vol.16, N°2

¹¹³ *ibid*

complicated and the only solution is treaties whereby contracting countries decide to facilitate the recognition and enforcement of the other contracting countries' judgments¹¹⁴.

In fact, except the Brussels Convention of 1968 modified by a Community Regulation in 2000 which provides for a free movement of judgement within the Community when the judgement is issued by a Community member¹¹⁵, Recognition and Enforcement of foreign judgements are still underdeveloped and underused.

Concerning Arbitration, even though it seems as complicated as Litigation, there are much more instruments which enable the movement of arbitral awards. The best known is certainly the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958 which has been signed by 134 countries¹¹⁶. It is a real success in practice as it makes the process of getting recognition and enforcement less complicated. Some countries have therefore suppressed almost every impediment so as to be in line with the international requirements: it is the case of Nigeria¹¹⁷.

As a result, it appears that effectiveness is again on the side of Arbitration thanks to all these regulations. However, it still lacks some effectiveness since all the countries in the World are not parties to conventions, especially the New York one¹¹⁸.

1.3. Sources of International Commercial Arbitration

1.3.1. Domestic Sources

National Law is an important source of International Arbitration. Because domestic and international arbitration exist, lots of countries have made the distinction in their system; they have a law for domestic (or national) arbitration and one for international arbitration¹¹⁹. It is

¹¹⁴ A.I. Okekeifere, *Journal of International Arbitration*, December 1998, pp.92-93. Unfortunately, even bilateral treaties between countries with good relations are scarce or still complicated: for example, the bilateral treaty between the United-States and England provide a rather complicated process

¹¹⁵ J-M Jacquet & P. Delebecque, «*International Business and Investment Law*», 2002, p. 355-359. That surely has been possible after a long process of reunification (almost 40 years) through the EU.

¹¹⁶ available at <http://arbiter.wipo.int/arbitration/ny-convention/parties.html>. South Africa has joined this convention.

¹¹⁷ Andrew I. Okekeifere, *Journal of International Arbitration*, December 1998, p.92; it is possible to obtain recognition though the award has been obtained from a biased tribunal or arbitrator

¹¹⁸ M. Wang., *Arbitration International*, 2000, Vol.16, N°2

¹¹⁹ J-M Jacquet & P. Delebecque, «*International Business and Investment Law*», 2002, p. 377

the case of France where in 1981, sixteen articles (1492 to 1507)¹²⁰ were introduced in the New Code of Civil Procedure.

South Africa, on the contrary, has still passed no regulation on International Arbitration. It just has its Arbitration Act 42 of 1965 which deals therefore with both domestic and international arbitration. Despite the drafting of a bill on International Arbitration by the Law Commission whose conclusions are clear for a long time now¹²¹, nobody has passed the regulation and the country is still lagging behind the likes of Zimbabwe¹²² or Madagascar¹²³.

1.3.2. International Sources

International Conventions or Treaties are important sources. Two Conventions are to be considered fundamental.

The first one is the New York Convention for the Recognition and Enforcement of Foreign Arbitral Award (1958) already seen. The second one is the Washington Convention on the Settlement of Investments Disputes between States and Nationals of Other States (1965) which created the International Centre for the Settlement of Investment Disputes (ICSID)¹²⁴. This Convention clarified a sensitive area: Arbitration with States. Developments in more detail will follow on these two Conventions.

1.3.3. Facultative Sources

Rather than writing a treaty which involves a long process and is only applicable in the countries which have signed and ratified it, the UNCITRAL, in 1985, came up with a Model Law on International Commercial Arbitration¹²⁵. It's a "soft-law" supposed to be the framework to redaction or modification of national laws on International Arbitration¹²⁶.

¹²⁰ available at <http://www.legifrance.gouv.fr/WAspad/RechercheSimpleArticleCode> (only in French)

¹²¹ 1998 SALC Report

¹²² 1996 Arbitration Act

¹²³ Arbitration Law N°98-019 on 11 November 1998

¹²⁴ C.B.Lamm, *Jurisdiction of the International Centre for Settlement of Investment Disputes*, ICSID Review – F.I.L.J., 1991, Vol.6, N°2, pp.462-463

¹²⁵ available at <http://www.uncitral.org/english/texts/arbitration/ml-arb.htm>

¹²⁶ J-M Jacquet & P. Delebecque, «International Business and Investment Law», 2002, p. 376

The success of the UNCITRAL Model Law is undeniable¹²⁷ because it has led to a wave of modernization on international arbitration laws both in developed (Scotland, Germany,...)¹²⁸ and developing countries (Nigeria, India and Kenya)¹²⁹. Not only has it encouraged some countries to pass a law on International Commercial Arbitration but it also generated a movement of harmonization¹³⁰.

1.3.4. The case of the Lex Mercatoria

Professor Goldman is the “father” of this concept and participated to a large extent to its development¹³¹. To the late Professor it is “an autonomous source of law proper to the economic relations (*commercium*) between citizens and foreigners (*peregrine*)”¹³².

It is clear that this type of sources is perfectly suitable for International Commerce as it avoids the different national systems and their laws¹³³. Professor Goldman considers that the strength of the *Lex Mercatoria* is its “customary” and “spontaneous” nature¹³⁴. These rules were created by the merchants and for the merchants¹³⁵.

In spite of the theoretical discussions about the legal value of those rules¹³⁶ and their nature¹³⁷, one cannot deny the importance of the *Lex Mercatoria* in International trade. It should not be



¹²⁷ in 1995, P. Sanders found 22 States which have adopted an International Arbitration Law on the basis of the Model Law; P.Sanders, *Unity and Diversity in the Adoption of the Model Law*, Arbitration International, 1995. Since 1995, N°8, some other countries have adopted this kind of law with the help of the Model Law: Singapore, Germany, India, Kenya and Zimbabwe

¹²⁸ New Zealand Arbitration Act 99 of 1996; New German Arbitration Law, tenth book of the German Code of Civil Procedure (commenced on 1 January 1998)

¹²⁹ Nigerian Arbitration and Conciliation Act of 1988; Indian Arbitration and Conciliation Act 26 of 1996; Kenyan Arbitration Act 4 of 1995

¹³⁰ J-M Jacquet & P. Delebecque, «International Business and Investment Law», 2002, p. 376

¹³¹ Goldman, *La Lex Mercatoria dans les contrats et l'arbitrage internationaux: réalités et perspectives*, (“*Lex Mercatoria* in International Contracts and Arbitration: reality and prospects”), Clunet, 1979, p.475

¹³² *ibid*, p.3

¹³³ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 118

¹³⁴ Goldman, “*Lex Mercatoria* in International Contracts and Arbitration: reality and prospects”, Clunet, 1975

¹³⁵ *The Bremen v. Zapata Offshore Co.*, 407 US 1 (1972) in A.F.Lowenfeld, *Lex Mercatoria: An Arbitrator's View*, Arbitration International, 1990, Vol.6, N°2

¹³⁶ Some authors have been in favour of the *Lex Mercatoria* (O.Lando, *The Lex Mercatoria in International Commercial Arbitration*, International and Comparative Law Quarterly, 1985, p.747-748), some are sceptical (Lord Mustill, *The new Lex Mercatoria: the First Twenty-Five Years*, Arbitration International, 1988, p.86) and the rest of them are deeply hostile (Mann, *The Proper Law in the Conflict of Laws*, International and Comparative Law Quarterly, 1987, p.437-448)

¹³⁷ Is it an autonomous set of regulations like O.Lando, I.C.C.L, 1985 or a set of rules that can govern a whole contract or simply the reflection of some general principles of Law and Trade usages? See the excellent article of J. Paulsson, *La Lex Mercatoria dans l'Arbitrage CCI* (“*Lex Mercatoria* in the ICC Arbitration”), Revue de l'Arbitrage, 1990, N°1

seen with suspicion¹³⁸ or as a denial of national law but mainly as a source of law created through a long process of practice, customs, precedents, conventions and in fact many national laws¹³⁹.

The content of the *Lex Mercatoria* is unclear since it has never been codified¹⁴⁰. Nevertheless, some principles are well-known and well-established¹⁴¹.

Lex Mercatoria can easily be considered as a source of International Arbitration because it has already been used by arbitrators (notably in Institutional Arbitration¹⁴²). But all the authors agree to condemn an abusive use of this corpus of rules. A contract which stipulates the governing law forbids the arbitrators to apply the *Lex Mercatoria* rather than the chosen law, even if the arbitrators act as *amiable compositeur*. The arbitrators are never entitled to write new provisions in the contract¹⁴³.



¹³⁸ M. Sornarajah, *The UNCITRAL Model Law: A Third World Viewpoint*, Journal of International Arbitration, 1989, Vol.6, N°4

¹³⁹ A.F.Lowenfeld, *Arbitration International*, 1990, Vol.6, N°2

¹⁴⁰ Despite his scepticism, Lord Mustill developed a sample of rules that can easily be part of the *Lex Mercatoria* available in Lord Mustill, *Arbitration International*, 1988,

¹⁴¹ It is possible to evoke the principle *pacta sunt servanda* (parties are bound by the terms of their agreement), the principle *rebus sic stantibus* (circumstances may alter the contract) which obliges the parties to renegotiate even if the contract contains no revision clause. The principle that parties have to act and perform in good faith (eg: the case of *estoppel* which is an interdiction for a party to contradict itself to the detriment of the other party), that they have to mitigate their losses and that they can stop the performance of the contract if the partner has committed a substantial breach: J. Paulsson, "Lex Mercatoria in the ICC Arbitration", *Revue de l'Arbitrage*, 1990, N°1

¹⁴² the best example is the *Norsolor* case, CCI N°3131, *Revue de l'Arbitrage*, 1993, p.525 and see also the C.C.I. case N°4761/1987, *Clunet*, 1987.1012, p. 1017 on the principle of mitigation

¹⁴³ A.F.Lowenfeld, *Arbitration International*, 1990

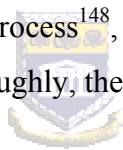
Chapter 2: The Different Kinds of Arbitration and the Arbitration Clause

2.1. The Types of Arbitration

There are two types of arbitration: on the one hand, Institutional Arbitration where the parties pick the rules of a specific institution which will monitor the process and supply some relevant services. On the other hand, *ad hoc* arbitration will be used by parties who do not want or need particular help or assistance. Parties to arbitration will have to choose between those two solutions to solve their dispute¹⁴⁴

2.1.1. Advantages and Drawbacks of an Arbitral Institution: The International Chamber of Commerce (ICC)

The ICC is one of the leading organisations in the settlement of international disputes by arbitration¹⁴⁵. As an arbitral institution, its main goal is to provide a framework and recent rules the parties can rely on without doubt (for instance, the 1998 Arbitration rules of the ICC will give to the parties the procedure to follow; the specificities of the ICC Rules are the Terms of Reference¹⁴⁶ and the inspection of the award by the Court¹⁴⁷). They provide a degree of permanency that allows to speed-up the process¹⁴⁸, qualified and trained staff and a scale of costs so that the parties know in advance, roughly, the amount of the fees¹⁴⁹.



Compared with an *ad hoc* arbitration, the costs are likely to be more important because the parties will have to pay the administrative expenses linked to the institution added to classical fees (arbitrators, lawyers, accommodation). Lastly, institutional arbitration is potentially longer due to the necessary intervention of the institution during the process¹⁵⁰.

The next page presents the procedure in front of the ICC when parties decide to arbitrate.

¹⁴⁴ M. Wang, *Arbitration International*, 2000, Vol.16, N°2

¹⁴⁵ A. Redfern & M. Hunter, *Sweet and Maxwell*, 1999, p. 50. Created in 1923, Some authors consider that the institution has gained a colossal “know how” throughout the development of arbitration in the World: M. Philippe-Gazon, *International Business Law Journal*, N°4, 1997, p.443

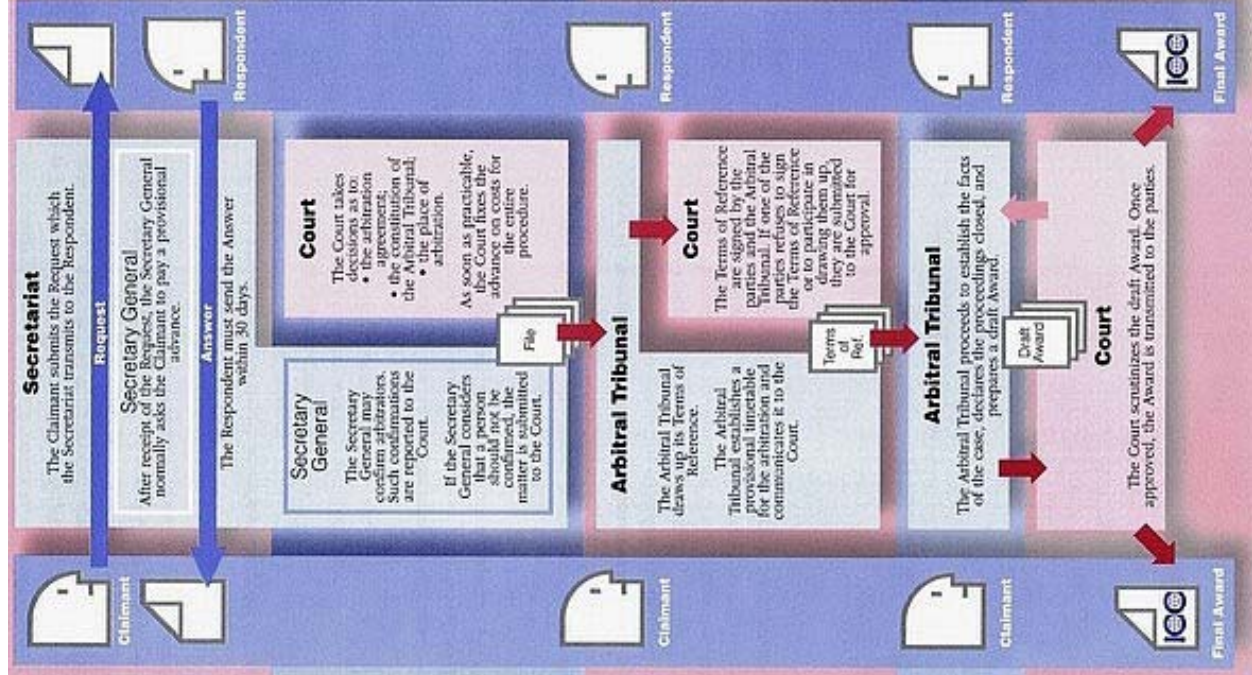
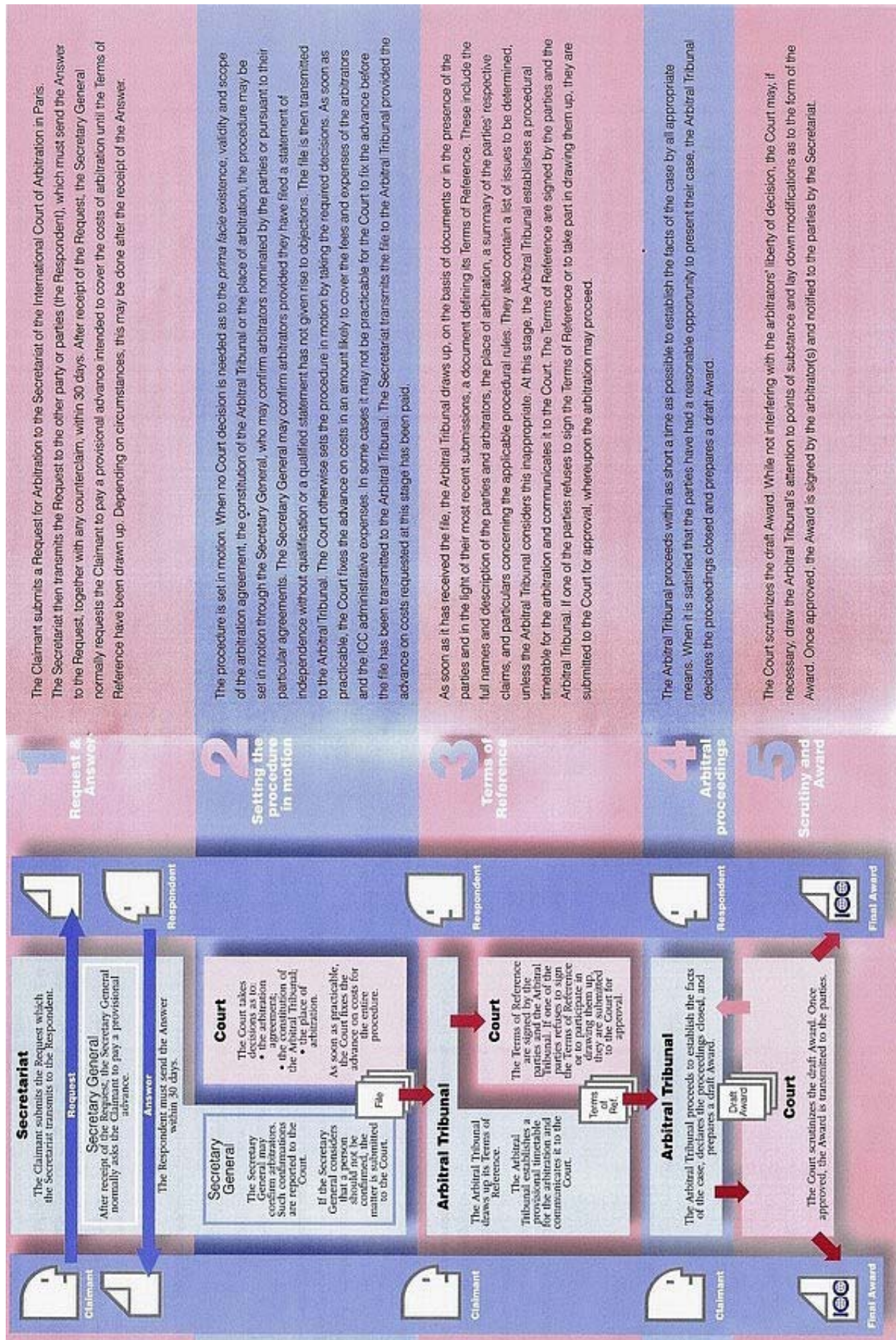
¹⁴⁶ Agreement between the parties and the Court on the issues that will be settled by arbitration.

¹⁴⁷ A. Redfern & M. Hunter, *Sweet and Maxwell*, 1999, p. 51

¹⁴⁸ Especially with the new 1998 Arbitration Rules which transferred some powers from the Court which meets only once a week to the Secretary General which is permanent: a good example is the power of confirmation of the coarbitrators, sole arbitrators and chairmen in art.9.2, 1998, ICC Arbitration Rules

¹⁴⁹ A. Redfern & M. Hunter, *Sweet and Maxwell*, 1999, p. 49-50

¹⁵⁰ Though the institution provide a time-limit to issue the award (6 months for the ICC), it is “often unrealistically short”: A. Redfern & M. Hunter, *Sweet and Maxwell*, 1999, p. 46



2.1.2. Advantages and Drawbacks of an ad hoc arbitration

The advantage of an *ad hoc* arbitration is its flexibility: it can therefore perfectly fit the need of the parties who will choose the procedure they want¹⁵¹. That is why a lot of arbitrations involving a State are conducted this way, notably about oil concession agreement¹⁵².

Considering the importance of the African States in the economic life and the lack of suitable Institutions, *ad hoc* arbitration might be more relevant on the African continent. However, *ad hoc* arbitration has mainly two drawbacks: firstly, parties will have to take care of the redaction of the clause which will have to include some key issues¹⁵³ if they don't want to see the procedure delayed¹⁵⁴ by the bad faith of one party. The second drawback is the result of the first one. Writing the arbitration clause will be time-consuming because the parties have to agree on a certain amount of questions. It can therefore be advised to include some sets of rules such as the UNCITRAL Arbitration Rules and try to avoid using the rules of an institution as there might be too many references to the said institution¹⁵⁵.

2.2. The Content of the Arbitration Clause

As already stated, the content of the arbitration agreement will be essential in an *ad hoc* arbitration whereas in institutional arbitrations parties will rely on the arbitration rules of the chosen Institution. Here is an outline of the key issues the parties must include in their arbitration clause.

2.2.1. Nomination and Number of Arbitrators

Concerning the number of arbitrators, an uneven number of arbitrators is commonly advised¹⁵⁶: usually, one and no more than three. If the parties decide to arbitrate with just one person, they will have to agree on this person which sometimes is not evident. They will have to foresee this difficulty in the arbitration agreement if they are in an *ad hoc* arbitration. In an Institutional arbitration, the institution steps in to appoint the sole arbitrator¹⁵⁷.

¹⁵¹ K.-H. Böckstiegel, *Settlement of Disputes between Parties from Developing and Industrial Countries*, ICSID Rev. – FILJ, Fall 2000, Vol.15, N°2, p.285

¹⁵² A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 47

¹⁵³ Key issues include the ones below such as the place of arbitration, the appointment of the arbitrator, the challenge of arbitrator, the powers of the arbitrator.

¹⁵⁴ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p.48

¹⁵⁵ *ibid*, p.47

¹⁵⁶ A. Redfern & M. Hunter, Sweet and Maxwell 1999, p. 165

¹⁵⁷ Art. 8.3, Arbitration Rules of the ICC

Sometimes, three arbitrators are required (it depends on the importance of the contract, the amount of the dispute)¹⁵⁸. The perfect procedure occurs when each party manage to designate one arbitrator and when the third arbitrator (called the President) is nominated by both parties or by the two arbitrators already appointed. However, some troubles can happen during the process of nomination. One party can refuse to designate its arbitrator or the designation of the president can be impossible since the people supposed to appoint him cannot agree on a name. Again, in the institutional arbitration, the institution will intervene to help the parties in the constitution of the arbitral tribunal¹⁵⁹. But, in an *ad hoc* arbitration, the arbitration clause will have to anticipate all these difficulties to be efficient and maybe refer to a third body which will have the power to solve the problem¹⁶⁰

The nomination of arbitrators can be complicated when a dispute arises in a multi-party relationship. It happened in the *Dutco* case¹⁶¹ where a consortium had been created between three companies. A dispute arises and the claimant (Dutco) goes to the ICC since it was an ICC arbitration and appoints its arbitrator. The ICC asks the two respondents (BKMI and Siemens, the partners of Dutco in the consortium) to appoint one arbitrator for the two. The two defendants go to the national judge in an attempt to set aside this decision of the ICC claiming that the principle of equal treatment of the parties had been neglected. The French Cour de Cassation agrees with them¹⁶².



This judgement could have had terrible consequences for the ICC and for Paris as a place of arbitration¹⁶³ without the quick changes in the Arbitration Rules of the ICC. Indeed, if the parties are unable to find a method to nominate the arbitrators, the Institution is allowed to appoint alone the three arbitrators¹⁶⁴. Notwithstanding this change, the principle remains that

¹⁵⁸ M. Philippe-Gazon, International Business Law Journal, N°4, 1997, p.451

¹⁵⁹ Art. 8.4, Arbitration Rules of the ICC

¹⁶⁰ The South African Arbitration Act of 1965 gives powers to the parties to solve problems in appointing arbitrators (Sec.10) but the courts are still essential in the process to stop deadlocks (Sec.12). In practice, most of the appointments are made by arbitration associations or professional bodies: P.M.M.Lane, International Handbook on Commercial Arbitration, South Africa, Suppl. 20 (October/1995), Chap.V, §5

¹⁶¹ Case N° 5836/MB of the ICC: *Dutco Construction Co. v. BKMI Industrieanlagen GmbH and Siemens AG*

¹⁶² Civ 1^{ère}, 7 January 1992

¹⁶³ M. Philippe-Gazon, International Business Law Journal, 1997, N°4, p.449

¹⁶⁴ J.L. Greenblatt & P. Griffin, *Towards the Harmonization of International Arbitration Rules: Comparative Analysis of the Rules of the ICC, AAA, LCIA, CIET*, Arbitration International, 2001, N°1; in the Arbitration Rules of the ICC, it is the article 10.2

the multiple claimants will appoint one arbitrator jointly and the multiple defendants will appoint another arbitrator jointly¹⁶⁵.

2.2.2. Qualities required for an arbitrator: Grounds for challenge

The main qualities an arbitrator must have are impartiality and independence. Partiality occurs when an arbitrator favours a party whereas a lack of independence can be found when an arbitrator had or have relationships with one of the parties or the dispute¹⁶⁶. For instance, the fact that an arbitrator who had, previously to the arbitral proceeding, worked for one of the party on a legal opinion in favour of the party's theory in the arbitration was the ground for the setting aside of the award¹⁶⁷. Nevertheless, economic relations are not the only one where dependence can occur. Ideological links can be relevant¹⁶⁸: it was seen in the *Pinochet* case, where the House of Lords cancelled its decision because "a man may not be a judge in his own cause"¹⁶⁹.

In the United States, the arbitrator appointed by a party in a three-member arbitration tribunal can be partisan but not dishonest¹⁷⁰. In spite of this, in the recent years (notably because of the impact of the *Iran-US Claim Tribunal*), the concept of neutrality has gained strengths and is now a pillar, specially in international arbitration¹⁷¹.

In relation to that, arbitrators must disclose all the relevant information which could have arisen between him and one of the parties. This obligation can be found in national laws¹⁷² as well as in arbitration rules (article 9.1, ICC Arbitration Rules).

Lacks of independence or impartiality is the main reason of challenging an arbitrator but is not the only one. In a technical matter, it can be very useful to appoint someone who is a specialist of the subject-matter¹⁷³ but if during the proceedings, a party notice that an

¹⁶⁵ Art. 10.1, Arbitration Rules of the ICC

¹⁶⁶ D.J. Branson, *Arbitration International*, 1987, N°1

¹⁶⁷ Court of Appeal of Paris, *Consorts Ury v. Galerie Lafayette* 8 may 1970, *Revue de l'arbitrage*, 1970, p.80

¹⁶⁸ T. Giovannini, *Arbitrators and Arbitrators Institutions: Conflicts of Interest*, *International Business Law Journal*, 2002, N°6, p.636

¹⁶⁹ *Re Pinochet*, [1999] 2 WLR 272 at 283. The judges decided in this way because Lord Hoffman had relationship with Amnesty International (a party to the appeal) and therefore had interest in the outcome of the case

¹⁷⁰ Court of Appeal of the State of New York (9th Circuit), *Atsa*, 21 March 1983, 702 *Fed. 2d*

¹⁷¹ T. Giovannini, *International Business Law Journal*, 2002, N°6, p.631

¹⁷² Art. 1452, New Code of Civil Procedure

¹⁷³ see footnote 91

arbitrator has no qualifications whereas the arbitration agreement required a qualified person, the arbitrator can be challenged as well¹⁷⁴. Finally, a challenge can occur if an arbitrator does not take his mission seriously (case of a person unreachable by phone), if he is mentally or physically unable to conduct the proceedings¹⁷⁵ or if he dies.

The procedure of challenge is different from one country or institution to another¹⁷⁶. Still, the South African Arbitration Act of 1965, unlike modern laws on International Arbitration, gives power to the Court to challenge an arbitrator “at any time [...] on good cause shown”¹⁷⁷. It is giving too much power to the courts, of course¹⁷⁸.

2.2.3. Powers of the Arbitrators

The powers of the arbitrators can be modified by the parties or by national courts.

2.2.3.1. The impact of the parties on the powers of the arbitrators:

This can happen in different ways. Firstly, the parties can decide to grant specific powers to the arbitrators, such as the proof of facts (the use of Discovery, of Experts, of oral proofs)¹⁷⁹. Secondly, by reference with institutional or international rules of arbitration in the arbitral agreement, some powers are given to the arbitrators or to the institution (appointment of experts, determination of the place of arbitration, the language)¹⁸⁰. Thirdly, the parties can establish the Terms of Reference which define the scope of the mission of the arbitrators¹⁸¹. This act has the consequences to limit the powers of the arbitrators (contrary to the first two examples abovementioned) to certain issues and is very important because the fact that arbitrators decide beyond their powers is a cause of annulment of the final award, according to the New York Convention¹⁸². Finally, parties can precise in the clause that the arbitrators have to act *ex aequo et bono* or as *amiable compositeur*. This is a power added to the arbitrators to moderate a law with equity¹⁸³.

¹⁷⁴ Sect. 24(1)(b), English Arbitration Act 1996

¹⁷⁵ Sect. 24(1)(c), English Arbitration Act 1996

¹⁷⁶ In France, the article 1493 of the New Code of Civil Procedure gives power to the President of the *Tribunal de Grande Instance* to solve the problems relating to the constitution of the arbitral tribunal unless otherwise stated by the parties; in the Arbitration Rules of the ICC, power is given to the Court (Article 11)

¹⁷⁷ Section 13(2)

¹⁷⁸ R.H. Christie, *Arbitration International*, 1993, Vol.9 N°2

¹⁷⁹ A. Redfern & M. Hunter, *Sweet and Maxwell*, 1999, p.248

¹⁸⁰ Art. 14 (place of arbitration) & Art. 16 (language of arbitration), Arbitration Rules of the ICC

¹⁸¹ M. Philippe-Gazon, *International Business Law Journal*, N°4, 1997, p.456

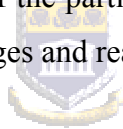
¹⁸² Art. V.1 (c), New York Convention

¹⁸³ A. Redfern & M. Hunter, *Sweet and Maxwell*, 1999, p. 43; see art.28 (3) of the UNCITRAL Model Law

2.2.3.2. The balance of powers between the arbitrators and the national courts:

This question is essential because the less the national courts can intervene during the arbitral process, the more efficient arbitration is and can play its role in International Commerce. However, it is better to see these two entities as complementary rather than as competitive. Some key problems, during the procedure, will require both interventions because the arbitrators have less power than national courts. For instance, the interim measures can be ordered by the arbitrators but since they lack the *Imperium* (authority a judge receive from the State and which give him the right to see his decision implemented), parties can refuse to obey. The judge will collaborate with the arbitrators to see the measure applied on the defective party¹⁸⁴. And even though arbitrators can get these powers in the arbitration clause¹⁸⁵, the collaboration must not be neglected. Moreover, the national judges have still important powers regarding the control of the awards, especially when it is about recognition and enforcement of the arbitral decision¹⁸⁶.

The balance of powers between the arbitral justice and the State justice is such an important matter that the Model Law has tried to limit the intervention of the national courts to essential points (interim measures, equal treatment of the parties) and has made the arbitral procedure independent¹⁸⁷. It is one of its main advantages and reasons of its success.



2.2.4. The Law governing the arbitration clause and the procedure

Unless otherwise decided by the parties, the arbitration agreement is in most cases governed by the law of the contract¹⁸⁸. Nonetheless, given the severability of the arbitration clause from the whole contract, the parties can choose a law governing the arbitration agreement different from the one of the substance of the rest of the contract. This choice implies that the law selected will govern notably the arbitrability of the matter (the field where arbitration is possible) and the procedure of the arbitration (especially about the proof of facts which differs completely in the civil law system from what it is in the common-law countries¹⁸⁹).

¹⁸⁴ J-M Jacquet & P. Delebecque, «International Business and Investment Law», 2002, p. 369

¹⁸⁵ P.Fouchard, E.Gaillard, B.Goldman, *Traite de l'Arbitrage Commercial International*, («International Commercial Arbitration Treaty»), Litec, 1996, p.730

¹⁸⁶ Art. V, New York Convention

¹⁸⁷ Art. 5 et 6, UNCITRAL Model Law on International Commercial Arbitration

¹⁸⁸ D. Sutton and J. Gill, *Russel on Arbitration*, Sweet & Maxwell, 2003, 22nd ed, p.68

¹⁸⁹ About the procedure of “Discovery” and “Cross-examination” which are unknown in the civil law countries; P. Bernardini, *The Arbitration Clause of an International Contract*, Journal of International Arbitration, 1992, N°2. To avoid some problems during the arbitral procedure due to uncertainties on the way to ascertain facts, parties should agree on a general principles such as Due Process and choose some rules governing the proof (A.L.Marriott, *Evidence in International Arbitration*, Arbitration International, 1989, N°3)

Changing the applicable law of the arbitration and switching to the one governing the whole contract is not always suitable because it might create changes and contradictions in the contract itself (that is the case with currency regulations)¹⁹⁰.

Finally and as already said before, the parties will have to take into account the law of the place of arbitration as well, known as the *lex arbitri*. That other law governing the arbitration is well-known¹⁹¹ and might be used in procedural matters (interim measures, constitution of the arbitral tribunal¹⁹², for instance, if the parties have not agreed on that) but also in matters of substance (arbitrability or public policy)¹⁹³.

All this goes to prove that a number of laws other than the “proper law” (i.e. the law of the contract) can be involved in the arbitral process and can generate some difficulties that Arbitration is supposed to avoid. Unlike the *lex arbitri* which is somewhat inevitable (but which effects the parties can circumvent by picking a neutral place), choosing a specific law to govern the arbitration agreement is superfluous as it might complicate the process. Lots of countries, indeed have softened the application of the *lex arbitri* to let the parties or the arbitrators choose the rules they consider appropriate¹⁹⁴. However, parties must keep in mind that the public policy of the *lex arbitri* must be respected in order to be enforceable at law¹⁹⁵

Even with several laws in the process, one other principle concerning at least the arbitrability is the concept of *favour arbitrandum* whereby the most favourable law (i.e. the law which considers the subject-matter arbitrable) will be applied¹⁹⁶. Indeed, the contradiction between the will of the parties (application of arbitration) and the application of a law is hardly understandable and goes against the very nature of arbitration. The theory of *favour arbitrandum* saves the arbitration and “holds the parties to their agreements”¹⁹⁷.

¹⁹⁰ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 93

¹⁹¹ Park, *The Lex Loci Arbitri and International Commercial arbitration*, International and Comparative Law Quarterly, 1983, p.21

¹⁹² A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 285

¹⁹³ *ibid*, p. 83

¹⁹⁴ This is the case of Algeria (art.458 bis 6, legislative decree of 1993) and Egypt (art.25 of the act n°27 of 1994); see also art.19 of the UNCITRAL Model Law which gives a complete freedom

¹⁹⁵ S. Jarvin, *The Place of Arbitration – A Review of the ICC Court’s guiding Principles and Practice when fixing the Place of Arbitration*, The ICC International Court of Arbitration Bulletin, December 1996, p.55

¹⁹⁶ B. Hanotiau, *The Applicable Law to the Issue of Arbitrability*, International Business Law Journal, 1998, N°7, p.764

¹⁹⁷ Craig, Park & Paulsson, *International Chamber of Commerce of Arbitration*, ICC Publishing, 1990, 2nd ed., p.81

One can see that International Commercial Arbitration is mainly a practical domain where the actors have few constraints based on national laws. It is also useful to refer to the International Commercial Usages which can prove convenient to solve any remaining problem.

Considering the applicable laws, it is obvious that countries will welcome International Arbitration if their national laws provide for few obstructions to the work of the arbitrators, especially the control of the national courts over the arbitral procedure¹⁹⁸. Secondly, since national laws will be used to solve some procedural issues (constitution of the tribunal, challenge of arbitrator,...), a country's best interests would be to enact a suitable regulation¹⁹⁹. South Africa has not yet passed a regulation on International Arbitration despite these two important points: as a consequence Cape Town, Johannesburg, Durban or Pretoria are almost never used as places of International Arbitration and it is easily understandable²⁰⁰.

2.2.5. The Place of Arbitration

The importance of the place of Arbitration is sometimes underestimated. Yet, the location of the Arbitration is essential²⁰¹.



The parties must think about two things when they choose the place. Firstly, even if the arbitrators are not bound by a national law as the procedural law of the Arbitration²⁰², the law of the country where the arbitration takes place will govern the arbitral proceedings²⁰³. It is therefore necessary to choose a place where the laws are efficient concerning international commercial arbitration²⁰⁴. Secondly, parties have to think of the recognition and enforcement of the future award and must take a country which has signed the New York Convention²⁰⁵.

¹⁹⁸ The countries which have implemented the UNCITRAL Model Law on International Commercial Arbitration are usually good examples of what is to be accomplished to attract Arbitration. See art.6 and 34 of the Model Law

¹⁹⁹ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 92-93

²⁰⁰ For instance, in 1999, South Africa held no International Arbitration under the auspices of the ICC, in 2002, South Africa welcomed just two Arbitrations and none in 2003 (for each year, see the Statistical Report of the ICC published in the ICC International Court of Arbitration Bulletin, N°1)

²⁰¹ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 167

²⁰² M. Blessing, *La Procédure d'Arbitrage selon le Nouveau Règlement de la CCI - Analyse des Changements* ("The Arbitral Procedure under the New Arbitration Rules of the ICC – Analysis of the Changes"), Bulletin de la Cour Internationale d'Arbitrage de la CCI, December 1997, p.23

²⁰³ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 167

²⁰⁴ Concerning the interferences created by the judge and allowed by the procedural law of the State where the Arbitration takes place, see P. Bernardini, Journal of International Arbitration, 1992, N°2

²⁰⁵ P. Bernardini, Journal of International Arbitration, 1992, Vol.9, N°2 and A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 167. The reciprocity of the New York Convention plays a role here.

The arbitration clause will have to contain the location of the arbitration in an *ad hoc* arbitration whereas the Institution will handle the issue in an institutional arbitration²⁰⁶.

2.2.6. The arbitral award by consent

During the arbitral procedure, it is common to see the parties resolving their dispute by reaching an agreement. It is defined by Jean-Marie Tchakoua as “a joint decision of the parties to settle their dispute amicably as confirmed by the arbitrator in the form of an arbitral award”²⁰⁷. This kind of ending is completely in respect with the essence of arbitral justice and its amicable characteristic²⁰⁸. The arbitral award by consent is in practice really successful as statistics show that an important number of disputes presented to arbitration end amicably before the final award²⁰⁹.

Some Institutions provide for the case of an award by consent in their rules of Arbitration and grant it the same properties as an arbitral award²¹⁰. Giving the same properties is essential so that the award by consent will benefit from the New York Convention: its recognition and enforcement will be easier²¹¹. Evoking recognition and enforcement can appear strange since the parties reached an agreement. Some authors therefore notice that the causes of annulment of a foreign award in the New York Convention are not suitable²¹² except the case of contravention to the Public Order²¹³. Moreover, the award by consent has a jurisdictional nature²¹⁴.

When the parties reach an agreement they want to see embodied in an arbitral award, the arbitrator will have a certain role to play (the drafting, in particular). However, the parties are still the owners of the decision and the arbitrator has no claim on it²¹⁵.

²⁰⁶ Art. 14.1, Arbitration Rules of the ICC

²⁰⁷ J.-M. Tchakoua, *The Status of the Arbitral Award by Consent: the limits of a useful ruse*, International Business Law Journal, 2002, N°7

²⁰⁸ R. David, «Arbitration in International Business», *Economica*, 1981, pp.28-29

²⁰⁹ R.H. Kreindler, *Transactions et Arbitrage dans le cadre du Règlement d'Arbitrage de la CCI*, (“Compromise and Arbitration in the frame of the Arbitration Rules of the ICC”), Bulletin de la Cour Internationale d'Arbitrage de la CCI, November 1998, p.22

²¹⁰ Art.30, UNCITRAL Model Law & Art.26, Arbitration Rules of the ICC.

²¹¹ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 384

²¹² J.-M. Tchakoua, International Business Law Journal, 2002, N°7

²¹³ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 385

²¹⁴ B. Oppetit, *Arbitrage, Mediation et Conciliation*, (“Arbitration, Mediation and Conciliation”), Revue de l'Arbitrage, 1984, p.318

²¹⁵ J.-M. Tchakoua, International Business Law Journal, 2002, N°7

Given the tremendous advantages of the arbitral award by consent (in terms of costs and time), parties should always introduce such a provision in their arbitration clause, especially if it is an *ad hoc* arbitration. Concerning the Institutional Arbitration, a lot of them grant the same characteristics for an arbitral award by consent or a classical arbitral award even though some of them are not completely clear or give the choice to the parties²¹⁶: therefore, parties should take care if this kind of provision is in the arbitration rules of the institution they have chosen.

2.3 Arbitrability

Arbitrability is used by every country to exclude some matters from the scope of arbitration. For instance, in France, matters subject to arbitration are the ones where the parties are free to dispose of their rights²¹⁷. In the South African Arbitration Act of 1965, matters concerning matrimonial cause or relating to status are not in the arbitration scope²¹⁸. Most of the recent arbitration laws in Africa have reduced the scope of non-arbitrability²¹⁹: a good example is Zimbabwe. That country changed its arbitration law in 1996 to limit the scope of arbitration to public policy, criminal matters, matrimonial and statutory matters and consumer contracts²²⁰.

Some countries, however, decided that arbitrators had some powers even in sensitive issues. The *Labinal* case²²¹ in France and the *Mitsubishi* case²²² in the United-States on anti-trust and competition matter are good examples. These two cases asserted that antitrust issues followed from international contracts were arbitrable at least for their civil consequences²²³. The same can be said in intellectual property disputes where a dispute over a license is arbitrable as it involves individual rights and provide confidentiality which is very useful in IP²²⁴.

One can see that Arbitration is widening its scope of intervention, thanks to the trust granted by national courts and regulations.

²¹⁶ Art.20, Rules of the Common Court of Justice and Arbitration of the OHBLA (“OHADA”)

²¹⁷ Art. 2059, Civil Code available in English at http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm#TITLE%20XVI. It is the case in Cameroon (Art. 756, Code of Civil Procedure of Cameroon)

²¹⁸ Sec.2, Arbitration Act

²¹⁹ A. A. Asouzu, Cambridge University Press, 2001, p.147-148

²²⁰ Sec.4(2), Arbitration Act of 1996

²²¹ CA Paris, 19 may 1993

²²² 473 U.S. 614 (1985)

²²³ *Labinal* case in J-M Jacquet & P. Delebecque, «International Business and Investment Law», 2002, p. 390

²²⁴ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 149: on the contrary, the validity of a patent or a trademark is out of the scope of arbitration because these rights on intellectual properties are granted by public authorities.

What South Africa should include in the matters subject to arbitration is more a political question than a legal one. Some key sectors, such as intellectual property, labour law or consumer law²²⁵, are sometimes excluded from arbitration because of their sensitivity. The balance South Africa must draw is hard to find. Nevertheless, a limited list gives the advantage to be sure of the scope of arbitration whereas a simple reference to public policy can give rise to problems of interpretation and therefore involve court proceedings.

2.4. The Severability of the Arbitration Clause

The severability of the Arbitration clause from the contract is a principle in International Arbitration. The independence of the clause allows the parties to maintain arbitration as their way of solving their disputes whatever happens to the contract²²⁶.

This principle has been established in France in the *Gosset* case²²⁷ whereby the Cour de Cassation ruled that the Arbitration clause benefits of a complete judicial autonomy. The principle applies also when the contract could not be implemented because the parties disagree on its conclusion²²⁸.

The Principle is also used in Nigeria thanks to law²²⁹ and the decision of the Supreme Court in 1976 in the *Royal Exchange Assurance v. Benthworth Finance Nigeria Ltd*²³⁰ case. It also applies in Mexico²³¹ and in the United-States²³². All these examples taken in developed and developing countries tend to show that this principle is widely accepted.

The concept of severability allows the arbitral tribunal to decide on its own competence (principle known as Competence/Competence)²³³. Although national courts have still some powers (notably concerning interim measures during the arbitral process), one of the main consequences of the severability of the arbitration agreement from the main contract is to

²²⁵ for instance, the nigerian patents, design and trade marks law are excluded from arbitration and consumer contracts in Zimbabwe are out of the scope of arbitration

²²⁶ J-M Jacquet & P. Delebecque, «International Business and Investment Law», 2002, p. 402-403

²²⁷ Cass., 1^{re} civ., 7 may 1963

²²⁸ *Navimpex* case, Cass., 1^{re} Civ., 6 december 1988, *Revue de l'Arbitrage*, 1989, p.641, note Goldman

²²⁹ Sect.12(2) of the Arbitration and Conciliation Decree 1988: “a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause”

²³⁰ I.A.L.R. Comm. 72 T p.83-84

²³¹ Art.1432, Commercial Code which is the exact copy of the article 16 of the UNCITRAL Model Law

²³² *Prima Point Co. v. Flood and Conklin Manufacturing Corp*, 388 U.S. pp.395-403 (1967)

²³³ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 264

make the national courts incompetent: France, Mexico, Kenya and Nigeria are again good examples²³⁴.

In spite of all these advantages, the situation in South Africa is completely different as the wording of a clause must be sufficiently clear to indicate that the clause should have a separate existence²³⁵. However, a more recent case excluded quite clearly the doctrine of severability²³⁶. Therefore, Arbitrators can not decide on their own competence all the time²³⁷. The South African Law Commission urged for the application of the principle in their draft of an International Arbitration Act²³⁸.



²³⁴ In France: Art. 1458, New Code of Civil Procedure. In Mexico: Art. 1424, Commercial Code and above all *Mitsui de Mexico, S.A. de C.V. and Mitsui and Company Ltd. v. Alkon Textil, S.A. de C.V.*, 4th Chamber of the Higher Court of Appeals of the Federal District, 21 October 1986; reported in Yearbook Commercial Arbitration XVI (1991), pp.594-598. In Kenya: Sect.17, Arbitration Act 1995. In Nigeria: Sect. 5 (1) of the Decree

²³⁵ *Heymans v. Darwins Ltd*, (1942) AC 357

²³⁶ *Wayland v. Everite Group Ltd*, 1993 (3) SA 946 (W) in D.W.Butler & E.Finsen, Arbitration in Africa, Kluwer Law International, 1996, p.205

²³⁷ *Fassler, Kamstra and Holmes v. Stallion Group of Companies (Pty) Ltd.*, 1992 (3) SA 825 (W)

²³⁸ South African Law Commission, *Arbitration: an International Arbitration Act for South Africa*, 1998, Schedule 1, Art. 16(1), p.205

WHAT SOUTH AFRICA SHOULD DO

The old hostility of the Third World toward International Commercial Arbitration which can be seen through the *Murmansk* case²³⁹ and which was highly criticised²⁴⁰ is now over. Lots of countries in notably Africa have passed regulations on International Commercial Arbitration²⁴¹ as they have understood that investors are attracted by this kind of alternative disputes resolution²⁴².

However, South Africa, one of the most economically powerful countries on the African continent lacks such a regulation. Arbitration, whether domestic or international, is still governed by the old fashioned Arbitration Act 42 of 1965²⁴³. The matter is so important that a Law Commission was created to propose a possible drafting of an International Arbitration Act. One of its first statements about the law was with no concession²⁴⁴.

The purpose of this part is to show what South Africa has to do if it wants a suitable law on International Commercial Arbitration. The first step is to draft a regulation based on the UNCITRAL Model Law²⁴⁵, then to ratify the Washington Convention to take advantage of the Centre for Settlement of Investment Disputes (ICSID) and finally, albeit ratified, to change the law which enacted the New York Convention as it creates some problems²⁴⁶. These three measures were also pointed out by the Law Commission.

²³⁹ Case whereby the Nigerian courts refused to enforce a foreign arbitral award because the country lacked laws on enforcement, [1974] 1 A.L.R. Comm. 1

²⁴⁰ J. Paulsson, ICSID Review – Foreign Investment Law Journal, Spring 1987, Vol 2, N°1, pp.19-65

²⁴¹ Countries from all over Africa: Egypt, Tunisia, Nigeria, Senegal, Kenya, Uganda, Zimbabwe, Madagascar

²⁴² On the impact of the ratification of the New York Convention for instance: A.A Asouzu, *The adoption of the UNCITRAL Model Law in Nigeria: Implications on the Recognition and Enforcement of Arbitral Awards*, Journal of Business Law, 1999, p.190

²⁴³ D.W.Butler & E.Finsen, *Arbitration in Africa*, Kluwer Law International, 1996, p.201

²⁴⁴ "By present day-standards, the Act is characterised by excessive opportunities for parties to involve the court as a tactic to delay the arbitration process, inadequate powers for the arbitral tribunal to conduct the arbitration in a cost-effective and expeditious manner and insufficient respect for the parties' autonomy (i.e. the principle that the arbitral tribunal's jurisdiction is derived from the parties' agreement to resolve their dispute outside the courts by arbitration). In short, the 1965 Act is widely perceived by those involved in international arbitration as being totally inadequate for this purpose": 1998 SALC Report, § 1.3, p.1

²⁴⁵ The minister of Justice, the Minister of Trade & Industry and the Association of Arbitrators called for the adoption of the Model Law (see D.W.Butler, *Journal of International Arbitration*, 2004, Vol.21, N°2)

²⁴⁶ The Recognition and Enforcement of Foreign Arbitral Award Act 40 of 1977

Chapter 3: Implementing the UNCITRAL Model Law

3.1. Background of the Model Law

The UNCITRAL Model Law on International Commercial Arbitration is an initiative from developing countries. Indeed, it is the Afro-Asian Legal Consultative Committee (AALCC) which led a study on neutral rules for international arbitration on behalf of the UNCITRAL²⁴⁷. The idea of these neutral rules came up when countries in the developing world realized that the arbitral institution whose arbitration rules were not favourable to the developing countries (in terms of choice of arbitrators and various costs, notably) were all situated in the West²⁴⁸.

The work of the AALCC was very useful²⁴⁹ and the UNCITRAL decided to write rules on arbitration. The opportunity was largely to create a set of rules first to urge some countries to take such law and also to bring uniformity and harmonization in the arbitration regulations of the world²⁵⁰.

The first Country to adopt the Model Law was Canada both on the federal²⁵¹ and the national level²⁵². So far, more than 30 countries have implemented the UNCITRAL Model Law²⁵³ and it is actually striking to note that developed and developing countries are equally represented out of the number of States which implemented it²⁵⁴.

²⁴⁷ M. Sornarajah, *Journal of International Arbitration*, 1989, Vol.6, N°4

²⁴⁸ AALCC, *Report on the Seventeenth, Eighteenth and Nineteenth Sessions held in Kuala Lumpur (1976), Baghdad (1977) and Doha (1978)*, pp.131-138

²⁴⁹ M. Sornarajah, *Journal of International Arbitration*, 1989, Vol.6, N°4

²⁵⁰ As stated by A.A Asouzu in *the UN, The UNCITRAL Model Law and the Lex Arbitri of Nigeria*, *Journal Of International Arbitration*, 2000, Vol.17, N°5: “the inadequacies and disparities in existing national laws made the Model Law more desirable”. The desire for uniformity is found in the “Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration”, § 1 & 3. Considering that other countries in southern Africa adopting the Model Law, the SALC decided to adopt the Model Law with very few modification so as to create a kind of harmonized area: D.W.Butler, *Progress by South Africa towards Developing the Necessary Infrastructure for International Arbitration Involving Commercial and Investment Disputes*, Colloquium on International Commercial Arbitration and African States held in London in June 2003

²⁵¹ Federal State of Canada, *Commercial Arbitration Act*, in force 10 august 1986

²⁵² For instance: Quebec Civil Code, Arts 2638 – 2643, and Code of Civil Procedure, Arts 382 and 940-951.2, in force 11 November 1986 (Quebec) & Ontario Arbitration Act 1991 (Ontario)

²⁵³ N. Dewan, *Interim Measures in Arbitration, A comparative Analysis of Indian and English Arbitration Acts*, *International Business Law Journal*, 2003, N°6, p.667. In Africa, the Model Law has been adopted by Egypt (Arbitration law of 1994), Kenya (Arbitration Act 4 of 1995), Madagascar (1998 Law on Arbitration), Nigeria (Arbitration and Conciliation Act of 1988), Tunisia (1993 Law on Arbitration), and Zimbabwe (Arbitration Act of 1996)

²⁵⁴ P.Sanders, *Arbitration International*, 1995, Vol.11, N°1

3.2. The Situation in South Africa

The Arbitration Act 42 of 1965 is the regulation on Arbitration. Therefore, it is used for both domestic and International Arbitration. A perusal gives a good idea of the problems the Arbitration can raise in practice. Indeed, Arbitration was developed out of the courtrooms and the interference of a court is considered as a limit to its expansion²⁵⁵. Hence, it can be expected that a regulation on Arbitration limits the intervention of the court during the arbitral process. Yet, the Arbitration Act is underlined by the opposite philosophy and grants wide powers of intervention to the courts: two good examples are the intervention of the court for the challenge of arbitrators “at any time”²⁵⁶ and the capacity for the court to grant interim measures while the arbitrators without the consent of the parties, cannot do so²⁵⁷.

The Model Law was designed to restrain the court’s intervention during the arbitral process²⁵⁸. Given the south African situation which calls for an International Arbitration Act, the disadvantages of the actual regulation and the quality of the Model Law, one can easily say that South Africa has to take the UNCITRAL Model Law as an inspiration for an ew regulation. The South African Law Commission²⁵⁹ and of a south African specialist in Arbitration, Professor Christie²⁶⁰ came to the same conclusion.

However, the Model Law which is seen by some authors as inadequate for developing countries²⁶¹ because it was mainly inspired in its principles by merchants from the developed world (e.g.: parties’ autonomy). The Model Law would then be a way to impose their views on developing nations. The author takes the example of the *lex mercatoria* which is accepted in the Model Law and was mostly created by businessmen from the developed world and which could be perfectly unfair for the developing countries because they are not aware of those principles.

South Africa cannot deny the importance of an International Arbitration Act after years of isolation. Every idea has its detractors²⁶² but one cannot contest the chance the Model Law

²⁵⁵ A. Marriott QC, *Indian and International Arbitration*, address delivered on 6th May 2002 at New Delhi

²⁵⁶ Sec.13(2)(a), “Termination or setting aside of appointment of arbitrators or umpire”, Arbitration Act

²⁵⁷ Sec.21, “General Powers of the Court”, Arbitration Act

²⁵⁸ M. Sornarajah, *Journal of International Arbitration*, 1989, Vol.6, N°4

²⁵⁹ 1998 SALC Report

²⁶⁰ R.H. Christie, *Arbitration International*, 1993, Vol.9 N°2

²⁶¹ M. Sornarajah, *Journal of International Arbitration*, 1989, Vol.6, N°4

²⁶² Lord Justice Kerr, *Arbitration and the Courts: The UNCITRAL Model Law, International and Comparative Law Quarterly*, 1986, p.3

was for Madagascar, Kenya, Nigeria and others in inciting them to modernize their legislations on Arbitration for more certainty and predictability²⁶³. South Africa must take this chance as soon as possible.

3.3. The Adoption of the UNCITRAL Model Law: the key points

Rather than explaining each of the Model Law's provisions, this paper will focus on important matters that the parliament will have to take into considerations when adopting the Model Law. It is fundamental to keep in mind two principles which inspired the drafters of the Model Law: the autonomy of the parties and the large scope of intervention of the arbitral tribunal which therefore limits the intervention powers of national courts²⁶⁴.

3.3.1. The Importance of certain definitions

3.3.1.1. The definition of "International"

As already said before, the Model Law adopted a mixed system to define "International". Article 1(3) uses the criteria of the nationality of the parties and then the internationality of the situation (two parties with the same nationalities involved in a contract or arbitration performed abroad).



If these two criteria can be easily understandable, the Model Law added subparagraph (c) which allows the parties to internationalize their dispute if "the subject-matter of the arbitration agreement relates to more than one country"²⁶⁵. These provisions create some imprecision due to the large scope in the definition of "International" that even the UNCITRAL Secretary-General picked out²⁶⁶. The case pointed by that provision could be the following: a contract between two national parties among which one is a subsidiary of a foreign mother company. Given the poor records of the Arbitration Act 42 of 1965, in this situation, South Africa would have all the good reasons to internationalize the dispute. This paper therefore recommends that South Africa maintains Article 1(3)(c) even though the definition of "subject-matter" could make the court intervene²⁶⁷. In any case, this provision

²⁶³ A. A. Asouzu, Cambridge University Press, 2001, p.171-172

²⁶⁴ UNCITRAL Secretariat, Explanatory Note on the Model Law on International Commercial Arbitration", § 14-16

²⁶⁵ Art. 1(3)(c), Model Law

²⁶⁶ Analytical Commentary 25 March 1985 (U.N. DOC.A/CN.9/264) § 31. *Guide to the Model Law*, pp. 73-74

²⁶⁷ P.Sanders, *Arbitration International*, 1995, Vol.11, N°1. If the court follow the spirit of the UNCITRAL Model Law for the development of Arbitration, this obstacle could be easily overcome. Developments will follow on the importance on accepting arbitration not only in fact but also in practice to quote Jan Paulsson.

does not permit the disputants to bring a purely domestic arbitration under the regime of the Model Law²⁶⁸.

In Africa, Nigeria kept the Article 1(3)(c) but added a (d) which give the disputants the ability to agree expressly “despite the nature of the contract” that the conflict “shall be treated as an international arbitration”²⁶⁹. This article made the (c) superfluous²⁷⁰ as it gives the parties wider powers than the UNCITRAL Model Law on the internationalisation of the arbitration²⁷¹. It is possible to find the same situation in Scotland and Hong Kong²⁷².

3.3.1.2. The definition of “Commercial”

There is no definition of “Commercial” in the Model Law. But the drafters have given a list of all the activities which can be seen as “Commercial”²⁷³. Moreover, they advise to construe this term widely²⁷⁴. The list has been included in the text of the law by several countries such as Nigeria, Egypt or Scotland. The term “commercial” will scarcely be an issue in practice²⁷⁵. In fact, including a definition would cause more problems than solve them: that was the viewpoint of Peru notably²⁷⁶.

The idea would be for South Africa to follow these countries and include the footnotes in the text of the law and to use the *travaux préparatoires* which will help a lot in interpreting the provisions whenever it is necessary²⁷⁷. A lot of countries made some references to documents which can help the court or arbitral tribunal to construe in a harmonized way the Model Law²⁷⁸. South Africa could of course do the same.

The State or its agencies can be involved even though the Model Law does not deal with this matter. Some countries decided to add a provision in their law allowing the States to arbitrate.

²⁶⁸ *ibid*

²⁶⁹ Sec.57(2)(d), 1988 Nigerian Arbitration and Conciliation Decree

²⁷⁰ P.Sanders, *Arbitration International*, 1995, Vol.11, N°1

²⁷¹ A.A.Asouzu, *The Legal Framework for Commercial Arbitration and Conciliation in Nigeria*, ICSID Review-F.I.L.J., fall 1994, Vol.9, N°2, p.214

²⁷² Sec.2L & 34B, Arbitration Ordinance of Hong Kong

²⁷³ footnote under Art. 1(1)

²⁷⁴ *ibid*

²⁷⁵ P.Sanders, *Arbitration International*, 1995, Vol.11, N°1

²⁷⁶ *ibid*

²⁷⁷ Analytical Compilation of Comments by Governments and International Organisations on the Draft Text of a Model Law on International Commercial Arbitration, A/CN9/263, 19 march 1985, §12-17

²⁷⁸ Sec.2(3), Zimbabwean Arbitration Act of 1996 provides that the court and arbitral tribunal may refer to the “Working Documents of the United Nation Commission which originally prepared the Model Law”

It is the case of Egypt²⁷⁹, Tunisia²⁸⁰ or to a lesser extent in Nigeria²⁸¹. This aspect shows the trust arbitration can enjoy nowadays and is essential to attract FDIs. The same limits apply: it must be a commercial or financial matter.

The involvement of States in arbitration is also developed through ICSID (see *infra*)²⁸².

3.3.2. Opt-in and Opt-out

3.3.2.1. Opt-in

Opting-in means that States adopting the Model Law leave the possibility for the parties by agreement to opt for the Model Law's application to domestic arbitration²⁸³. It is different from article 1(3)(c) as the opt-in option allows parties to use the Model Law in a genuine domestic arbitration (no relation with another state at all).

This option has been implemented in the Hong Kong legislation²⁸⁴, Nigeria with its section 52(2)(d) of the decree provides for similar effects.

The opt-in option can have some drawbacks: the main one being that domestic arbitration will be governed by a dual-system of arbitration rules which will complicate the task of the professionals. However, South Africa, considering the terrible effects the Arbitration Act of 1965 has on domestic arbitration²⁸⁵ should include the opt-in option in the future International Arbitration Act. For the matters the Model Law does not deal with (for instance the arbitrator's remuneration), the drafters of the Bill will have to take provisions to fill the gaps.

Opting-in is just a possibility for the parties having a domestic dispute, it is therefore necessary to specify that the Arbitration Act of 1965 will become the only regime for domestic arbitration: that modification of the Arbitration Act as the domestic arbitration law is not the subject but it was important to specify it.

²⁷⁹ Art.1, Egyptian Arbitration law of 1994

²⁸⁰ Art.7(5), Law N°93-42

²⁸¹ Tinuade Oyekunle, International Handbook on Commercial Arbitration, Nigeria, Suppl. 26 (February/1998) The State agencies may use arbitration but for the most important contracts, the agreement of the Council of Ministers seems necessary still although there is no legal provision about this.

²⁸² C.B.Lamm, ICSID Review – F.I.L.J., 1991, Vol.6, N°2, pp.462-463. J.Paulsson specifies that ICSID is only unsuitable for routine contracts: ICSID Review – FILJ, 1991, Vol.6, N°2, p.394

²⁸³ P.Sanders, Arbitration International, 1995, Vol.11, N°1

²⁸⁴ S. 2L, Arbitration Ordinance of Hong Kong

²⁸⁵ R.H. Christie, Arbitration International, 1993, Vol.9 N°2

3.3.2.2. Opt-out

This option contained in the law consists in the agreement of the parties to see their international arbitration governed by the legislation for domestic arbitration²⁸⁶. Some countries like Bermuda²⁸⁷ or Hong Kong²⁸⁸ decided to include such a rule, it is not advisable for South Africa to follow them as the parties will therefore see their international disputes regulated by the Arbitration Act of 1965 and lead to the exact opposite of what an International Arbitration Act is supposed to do.

3.3.3. Autonomy of the Parties and Principles of Procedures

Article 18 of the Model Law provides that the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. Albeit evident, this article is essential and must cover the whole procedure²⁸⁹, from the rules of evidence to the impartiality of the arbitrators or the language of the arbitration.

The autonomy of the parties can be seen in the Model Law through the powers given in the arbitration agreement by the parties to the arbitrators. Indeed, the arbitration agreement benefits of full strength as the court are not allowed to intervene²⁹⁰. The arbitrators can rule on their own jurisdiction (Article 16)²⁹¹, idea followed from the principle of severability of the arbitration clause²⁹². Thirdly, if the parties were not able to agree, the arbitrators can determine the rules of procedure (Article 19(2)), the place of arbitration (Article 20(1)) or the way evidence can be presented (Article 24(1)). Finally, the Model Law establishes the possibility of an arbitral award by consent (Article 30).

²⁸⁶ P.Sanders, *Arbitration International*, 1995, Vol.11, N°1

²⁸⁷ S. 29, Bermuda's International Conciliation and Arbitration Act 1993

²⁸⁸ S. 2M, Hong Kong's Arbitration Ordinance

²⁸⁹ P.Fouchard, E.Gaillard, B.Goldman, ("International Commercial Arbitration Treaty"), Litec, 1996, p.963, §1639

²⁹⁰ Combination of Art.5 and 8 of the Model Law. On the opposite, the South African Arbitration Act allows the court to set aside the arbitration agreement, "on good cause shown" (set.3(2))

²⁹¹ The South African Arbitration Act says nothing on competence/competence which means that in the absence on an agreement by the parties granting the power to the arbitrators to rule on their jurisdiction, the problem would have to be settled by the courts; see R.H.Christie, *Arbitration International*, 1993, Vol.9 N°2. Besides, J. Paulsson considers this principle as one of the most important a country must implement if it wants to be seen as a good venue for international arbitration (in J. Paulsson, *Accepting International Arbitration in fact - and not only in words*, in *Arbitration in Africa*, Kluwer Law International, 1996, pp.35-37)

²⁹² Again J.Paulsson sees this rule as an essential one (J.Paulsson, *Arbitration in Africa*, Kluwer Law International, 1996, pp.37-38)

3.3.4. The relation between national courts and arbitral tribunal

The courts' involvements in the arbitral process were based on the distrust of the States in Arbitration. They protected their scope of intervention. The South African Arbitration Act 42 of 1965 is an excellent example of this period²⁹³ although it was passed under a particular regime.

Nevertheless, things change and both the States and national courts show now trust in arbitration²⁹⁴. The Model Law was designed for limiting the intervention of the courts²⁹⁵ and helped some countries to adapt their regulations. Professor A.A.Asouzu called this rules "the third generation arbitration laws"²⁹⁶.

Limiting does not mean suppressing. It has already been noticed that arbitral tribunals and courts must be seen as complementary. The necessity is to resort to courts when there is no other solution and to grant no appeal on the decision. The Model Law works on three levels to lessen the powers of the courts. On the first level, the Model Law grants the arbitrators a wide scope of intervention (e.g. the governing law (art.28(2)), the rules of the procedure (art.19(2)), the place of arbitration (art.20(1)), the language (art.22(1))). On the second level, the Model Law allows States to select an Authority with some important powers²⁹⁷ (appointment of arbitrators (art.11(3)&(4)), the challenge process (art.13(3)), the hypothesis of an arbitrator unable to act (art.14)). Finally, on the last level, the courts play a role either on exclusive grounds (judgment on the arbitral decision to rule on its own jurisdiction (art.16(3)) or the decision of setting aside an award (Art.34)) or on these exclusive grounds with the powers abovementioned granted to the Authority (the repartition of the powers is decided by each country). To conclude, all the decision made by a court are without appeal except the decision of setting aside.

The idea of granting powers to an authority rather than a court is excellent. Because of the lack of such an Authority in South Africa²⁹⁸, this solution appears to be impracticable²⁹⁹.

²⁹³ the large powers granted to the courts are seen as the main drawbacks of the south African legislation; see D.W.Butler & E.Finsen, *Arbitration in Africa*, Kluwer Law International, 1996, p.201

²⁹⁴ Hon. A.Rogers, *Arbitrability*, *Arbitration International*, 1994, Vol.10, N°3

²⁹⁵ N. Dewan, *International Business Law Journal*, 2003, N°, p.667

²⁹⁶ A. A. Asouzu, Cambridge University Press, 2001, p.171-172

²⁹⁷ In Nigeria, the section 54(2), in case of a challenge of arbitrator, give the power to the Secretary-General of the Permanent Court of Arbitration, the Hague

²⁹⁸ on the way to develop Arbitration also in practice, see *infra*

²⁹⁹ 1998 SALC Report, § 2.125, p.53

Therefore, the assistance to the arbitral tribunal should be granted exclusively to a South African court. Since, sometimes, Arbitration deals with important contracts and huge amounts of money, the High Court seems preferable.

To demonstrate the inability of the South African arbitration act to foster arbitration, two examples will be taken: the challenge of arbitrators and the order of interim measures.

3.3.4.1. Challenge of Arbitrators

The comparison between article 13(2) of the Arbitration Act 42 of 1965 and the articles 13 and 14 of the Model Law is striking³⁰⁰. Whereas the Arbitration Act gives power to the court to intervene “at any time” and “on good cause shown”, the Model Law limits the ground to challenge an arbitrator to partiality and lack of qualifications. In terms of procedure, the arbitrators if the parties disagree are allowed to decide on the challenge³⁰¹ and the court is allowed to step in only if the challenge is rejected. Finally, the decision of the court is subject to no appeal to speed up the process. One can see that the court is completely free in South Africa to interact with the arbitration process whereas the Model Law allows the intervention on strict conditions (failure of the parties and the arbitral tribunal).

South Africa should take the example of Nigeria³⁰² or Mexico³⁰³ and implement the model law as soon as possible especially on this matter.

Questions were raised about the consequences of the appointment of a substitute arbitrator. Should the procedure carry on where it ended or start afresh? The Model Law gives the choice as it states in article 13(3) that “the arbitral tribunal [...] may continue”. Egypt³⁰⁴ and New Zealand³⁰⁵ decided that the procedure should start again.

The question whether South Africa should follow New Zealand or Egypt is tricky because challenge of arbitrators can occur on different steps of the process. Nevertheless, flexibility should be the rule as always and hence parties should be allowed to decide themselves.

³⁰⁰ R.H.Christie, *Arbitration International*, 1993, Vol.9 N°2

³⁰¹ The tunisian 1993 Law on Arbitration rejected the powers of the arbitrators to decide on the challenge (art.58)

³⁰² Sec.8(3) and 9(3), *Arbitration and Conciliation Decree* 1988

³⁰³ Art. 1428 & 1429, *Commercial Code*

³⁰⁴ Art.19, *Law on Arbitration in Civil and Commercial Matters* of 1994

³⁰⁵ Art.15, *Arbitration Act* of 1996. However, this article gives the parties the choice to decide on this matter by agreement

3.3.4.2. Interim Measures

Interim Measures are according to Redfern and Hunter “order issued by the arbitral tribunal or a national court and intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves”³⁰⁶. The granting of such a measure is to avoid the irreparable harm that could happen if the order is not granted³⁰⁷.

In the South African Arbitration act, the power to grant interim measures is given to the High Court (Section 21). It is the case for security for costs, for an interim interdict, for securing the amount of the dispute. Again, the arbitrators are not granted these powers. However, the parties can vest them with such powers, only if they agree. On the other hand, the Model Law recalls that a party, during an arbitral procedure, can request an interim measure from a court (art.9) and above all give the arbitral tribunal the power to grant interim measures “unless otherwise agreed by the parties” (art.17). There is just one limit to the power of the arbitrators, the measure must be limited to the subject-matter of the dispute. In fact, the Model Law grants this power to the arbitrators in the silence of the parties whereas, in the same circumstances, the Arbitration Act gives no power to the arbitral tribunal. One can see the difference of approach of these two regulations.



South Africa, in this field again should follow the philosophy of the Model Law towards more trust in arbitration. Interim measures are the best example of the cooperation needed between courts and arbitration³⁰⁸. As a decision by an arbitrator lacks the coercive power of enforcement³⁰⁹, court will have a role to play if a party is reluctant to implement the order. The court will be indispensable if the arbitral tribunal is not constituted yet³¹⁰ or if the measure is against a third party (in this case, the arbitral tribunal has no jurisdiction³¹¹).

³⁰⁶ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 345

³⁰⁷ N. Dewan, International Business Law Journal, 2003, N° 1, p.667

³⁰⁸ *ibid*, p.670; taking evidence is another one (art.27, Model Law)

³⁰⁹ D. Sutton and J. Gill, Sweet & Maxwell, 2003, 22nd ed, p.386-387

³¹⁰ N. Dewan, International Business Law Journal, 2003, N° 1, p.670

³¹¹ D. Sutton and J. Gill, Sweet & Maxwell, 2003, 22nd ed, p.386-387

Nigeria in its law³¹² repeats articles 9 and 17 of the Model Law whereas Mexico implements article 17³¹³ but differs slightly from article 9 in providing that a party can directly go to the court to see the measure granted³¹⁴.

Last but not least, the nature of the interim decision ordered by the arbitral tribunal is important. Some countries consider the order as an award: it is the case of Nigeria³¹⁵. Besides, the outcome will be the same if the term “order” is made applicable to Chapter VII of the Model Law on the enforcement of awards³¹⁶. Whichever system is chosen, South Africa would have an interest to take this kind of provision to ensure the validity and the efficiency of the interim measures as they will be enforced more easily.

3.3.5. Substantive Law

The Model Law gives the parties the choice to refer to “rules of law” to govern the contract in its article 28(1). This turn of phrase is to include non-national laws such as the *lex mercatoria* for instance³¹⁷. However, some countries found this provision too wide and decided to empower the parties to elect “the law”³¹⁸. One can see here the reluctance towards commercial usages or the *lex mercatoria* from developing countries.

If the parties give no clue about the governing law, the arbitrators are entitled to find the substantive law thanks to the conflict of laws of the system they deem applicable³¹⁹. Many countries implemented this provision with no change: Nigeria³²⁰ and Peru³²¹. Others decided to differ from the Model Law providing that in the absence of choice of law from the parties, the arbitrators have to choose the law of the state which has the strongest connections with the contract³²².

³¹² Sec.13, Nigerian Arbitration and Conciliation Decree 1988

³¹³ Art.1433, Commercial Code

³¹⁴ Art.1425, Commercial Code

³¹⁵ Sec.26(2), Arbitration and Conciliation Decree 1988

³¹⁶ Australia did that; see Prof. Michael C. Pryles, International Handbook on Commercial Arbitration, Australia, Suppl. 26 (February/1998)

³¹⁷ Art. 28(4) refers to “the usages of the trade applicable to the transaction”

³¹⁸ Art. 38(1), Bulgarian International Commercial Arbitration and Art 73 of the tunisian law n°93-42 of 26 April 1993

³¹⁹ Art. 28(2), Model Law

³²⁰ Sec.47 of the Arbitration and Conciliation Decree 1988

³²¹ Art. 103, General Arbitration Law No. 25935, in force 10 December 1992

³²² Art. 39(2), Egyptian Law on Arbitration in Civil and Commercial Matters of 1994; Art.1445, Mexican Commercial Code; Sec.28(1)(b)(iii), Indian Arbitration and Conciliation Act of 1996

South Africa and its Arbitration Act are reluctant to apply another law but the South African one when the arbitration takes place in that country³²³. This can be understood since this act is mostly intended to administer domestic arbitration (that is why an international arbitration act is so fundamental). South Africa should remember that the wider the possibilities of the act are, the more attractive the country is for international arbitration. This is the reason why the term “rules of law” instead of “the law” should be adopted. On the other hand, the ability given to the arbitrators to choose the law determined by the conflict of laws they deem applicable is not appropriate as it leads to uncertainty and add a step in the research of the governing law³²⁴. Is it advisable that South Africa follows the example of Egypt, Mexico and India³²⁵.

Finally, the Model Law allows the arbitrators to decide as *amiable compositeur* if the parties authorized them to do so. Even though this concept is not entirely accepted in common-law countries³²⁶, States like India and Nigeria³²⁷ adopted this provision. South Africa should do the same.

3.3.6. Setting Aside, Recognition and Enforcement

The setting aside of an award can only be located in the country where the award was made whereas recognition and enforcement can be sought in every country where the respondents has assets. The setting aside of an award has “extra-territorial effect”³²⁸ since the foreign courts will respect that ruling and refuse the recognition or enforcement of such an award. On the contrary, the refusal of recognition or enforcement by a court will only have effect in the State of that court and will not preclude the claimant from seeking enforcement in another State³²⁹.

³²³ P.M.M.Lane, International Handbook on Commercial Arbitration, South Africa, Suppl. 20 (October/1995), Chap.V, §5

³²⁴ in the system whereby the arbitrators apply the law of the state which has the most important connections with the contract, there is just one stage whereas in the system of the Model Law there are two steps: first they have to choose a law they consider applicable, then they choose the governing law thanks to the conflict of laws of this law.

³²⁵ See footnote 318

³²⁶ P.Sanders, Arbitration International, 1995, Vol.11, N°1

³²⁷ Sec.28(2), Indian Arbitration and Conciliation Act of 1996; Sec.22(3), Nigerian Arbitration and Conciliation Decree 1988

³²⁸ A.J. Van den Berg, *Non-domestic Arbitral Awards under the New York Convention*, Arbitration International, 1986, Vol.2, p.191

³²⁹ *ibid*, p.199

The Model Law gives the exact same grounds for setting aside and for rejecting recognition or enforcement (Art.34 & 36)³³⁰. Next to these grounds related to the procedure, the Model Law adds two other grounds: the fact that the subject-matter is not arbitrable under the law of the State or that the award is in conflict with the public policy of the State³³¹. Most of the States implementing the Model Law copied the provisions: Peru for instance³³². However, some countries decided “to avoid any doubt” about the blurred notion of public policy. They specified that an award affected by fraud or corruption or by the breach of the rules of natural justice will be contrary to the public policy. It is the case of Zimbabwe³³³ Bermuda³³⁴ or Australia³³⁵. Besides, Scotland decided to add this condition of non-corruption as a new ground for setting aside³³⁶. The Arbitration Act of 1965 gives roughly the same grounds as the Model Law in more general terms: misconduct, gross irregularity, arbitration tribunal exceeding its powers and award improperly obtained³³⁷.

About the setting aside, a query was raised to know the effect of that decision. Some countries consider that a rejection of the setting aside is equivalent to enforcement, France³³⁸ and Madagascar³³⁹ are examples. When the setting aside is accepted, the court can “decide on the merits” if the parties accept: this system is applied in Tunisia³⁴⁰ or Madagascar³⁴¹.



3.3.7. Final Observations

Some countries when adopting a law on International Arbitration decided to add further provisions notably on conciliation³⁴², on consolidation (the fact to join two or more cases into

³³⁰ the grounds are (i) incapacity of a party or invalidity of the arbitration agreement, (ii) a party not being able to present his case, (iii) the award beyond the scope of the submission to arbitration, (iv) irregular composition of the arbitral tribunal or the procedure not in accordance with the agreement of the parties. There is a fifth ground only applying for recognition and enforcement which is the setting aside

³³¹ P.Sanders, in his article *Unity and Diversity in the Adoption of the Model Law*, says that “public policy” can cover the matters not capable of settlement by arbitration.

³³² Art. 106, Peruvian General Arbitration Law No. 25935, in force 10 December 1992

³³³ Art.34, Zimbabwean Arbitration Act of 1996

³³⁴ Sec.27, International Conciliation and Arbitration Act 1993

³³⁵ Sec.19, Australian International Arbitration Act 1989

³³⁶ Art.34, Law Reform (Miscellaneous Provisions) Act 1990

³³⁷ R.H. Christie, *Arbitration International*, 1993, Vol.9 N°2

³³⁸ J-M Jacquet & P. Delebecque, «International Business and Investment Law», 2002, 3rd ed. p. 450

³³⁹ Art.462(5) of the law n°98-019 on Arbitration

³⁴⁰ Art.78(5) of the 1993 Law on Arbitration

³⁴¹ Art.462(5) of the law n°98-019 on Arbitration

³⁴² The UNCITRAL Conciliation Rules can be very useful, specially in Africa where non-adversarial dispute resolution are in line with the culture; D.W.Butler, *Journal of International Arbitration*, 2004, Vol.21, N°2. Nigeria for instance adopted these Conciliation Rules (Sec.55, Arbitration and Conciliation Decree 1988)

one when the claims are tightly linked) when parties agree³⁴³, on costs and interests and liability of arbitrators.

Whatever the drawbacks of the South African Arbitration Act 42 of 1965, one can deny that some provisions are effective and give real powers to the arbitrators. It is seen notably during the proceedings because the arbitrators can regulate the discovery of documents, the inspection of goods or property, the taking of evidence (sect.14) in particular. Besides, it allows parties to agree on arbitration either before or after the dispute occurs and to appoint arbitrators in the arbitration agreement or later (when the dispute arises) in the arbitration agreement³⁴⁴. Finally, an important point is the fact that the arbitral award is subject to no appeal (sect.28)³⁴⁵. However, the courts are too involved in the process (another example is the summoning of witnesses (sect.16)) and the autonomy of the parties are too denied to attract people. This is the main advantage of adopting the Model Law and the opt-in option.



³⁴³ Sec.24, Australian International Arbitration Act and Sec.35, English Arbitration Act. The matter is very controversial because even if such a measure can participate in a good administration of justice, it can be seen as a negation of the principle of the parties' autonomy. (that is why it is only possible with the agreements of the parties). Moreover, this measure can complicate the arbitral process (overlap of methods of appointment of arbitrators, governing laws). See A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 180. About South Africa, Prof. Butler considers that the arbitral tribunal should not have this kind of power: *Journal of International Arbitration*, 2004, Vol.21, N°2

³⁴⁴ Section 1, Arbitration Act of 1965 ("arbitration agreement"); Even though that law could have been written more clearly, it establishes two essential principles in Arbitration: the validity of pre-disputes agreement to arbitrate and the validity of future designations of arbitrators (naming somebody in advance as an arbitrator can create difficulties because it is highly advisable to appoint someone in light of the nature of the dispute). J.Paulsson,, *Arbitration in Africa*, Kluwer Law International, 1996, pp.34-35

³⁴⁵ J.Paulsson considers that provision (the award is binding and shall not be subject to any appeal except when setting aside or enforcement is sought) as a priority one where the State want to attract Arbitration: *Arbitration in Africa*, Kluwer Law International, 1996 p.38. It is essential that the International Arbitration Act contains such a provision like the Article 35(1) of the Model Law.

Chapter 4: Signing the Washington Convention

4.1. The State as a party to arbitration and the situation in South Africa

The involvement of a State or its agencies in an arbitration process is a complicated issue. In Africa particularly where the central government is seen as the natural owner of the economy and the resources³⁴⁶. However, for a number of years, there has been a movement, in developing countries, to resort to arbitration when the State or its entities take part in a contract³⁴⁷. This development is indisputably good news for arbitration as the States realize the benefit of this kind of Justice to attract investors³⁴⁸.

This trend is related to the Washington Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of Other States. This Convention is an initiative from the World Bank and has the same objectives: the need for international co-operation, the importance of investment and the supply of facilities for conciliation and arbitration of investment between a contracting party and the national of another contracting State³⁴⁹. Article 1 of the Convention creates the International Centre for Settlement of Investment Disputes (ICSID) which monitors the conciliation and arbitration system. Some authors consider that the Washington Convention is a perfect tool for developing countries which increase their FDIs from developed states in a mutual confidence ambience³⁵⁰.

This Convention has had an impressive success since, on the 20th December 2004, 154 countries have signed it³⁵¹.

Nevertheless South Africa has not signed it yet. Is it surprising for a country which has neglected International Arbitration up to this day? The country should follow the trend of all its neighbours which ratified the Convention³⁵².

³⁴⁶ see footnote 68

³⁴⁷ Senegal with its art.17 of the law of 1998 establishing the Oil Code, Cameroon with art.115 of the law of 1999 establishing the Oil Code, Egypt with the art.1 of the law on arbitration of 1994.

³⁴⁸ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 53

³⁴⁹ Preamble & Art.1, Washington Convention

³⁵⁰ A.S.El-Kosheri, *ICSID Arbitration and Developing countries*, ICSID Review – F.I.L.J., 1993, Vol.8, N°1, p.104

³⁵¹ for the whole list of contracting parties: <http://www.worldbank.org/icsid/constate/c-states-en.htm>

³⁵² Botswana (1970), Zimbabwe (1994), Mozambique (1995), Namibia (signed in 1998)

The situation is all the more paradoxical since South Africa is a member of the Southern African Development Community (SADC) whose main purpose is the co-operation in “investment and finance”³⁵³. Moreover, South Africa has signed Bilateral Investment Treaties (BITs) which are agreements between states to develop, promote and protect investments of nationals from the other country³⁵⁴ and which refer to ICSID to settle eventual disputes³⁵⁵.

It is important to examine the Convention in more detail, especially its scope of intervention which has been built through the case law of the Centre and the procedure, to assess the advantages South Africa would have in signing it.

4.2. The Washington Convention and ICSID

4.2.1. The Jurisdiction of the Centre

The intervention of the Centre is ruled by certain conditions: there must be consent between a Contracting State and a national of another Contracting State; it must be a legal issue and it must arise directly out of an investment³⁵⁶.

4.2.1.1. The Consent



The consent is seen as “the cornerstone of the jurisdiction of the Centre”³⁵⁷. When they give their consent, parties can not withdraw it unilaterally³⁵⁸. The consent can be found in three different sources. Firstly, it can be in the investment contract³⁵⁹: it raises no problem in this situation. Secondly, the consent can be found in a BIT or in an internal legislation of the host state (usually an “Investment Law”)³⁶⁰. The case law of the Centre gave strength to these last two possibilities in *AAPL v. Democratic Socialist Republic of Sri Lanka*³⁶¹ (case of a BIT with

³⁵³ Article 21(3) of the SADC Treaty

³⁵⁴ available at http://www.unctadxi.org/templates/Page___1006.aspx

³⁵⁵ for instance, Art.IX(2)(c) of the Chile/South Africa BIT; Art.9(2)(a) of the Netherlands/South Africa BIT, Art.VII(2)(a) of the Turkey/South Africa BIT; Art.8(3)(a) of the Republic of Korea/South Africa BIT (available at http://www.unctadxi.org/templates/DocSearch___779.aspx)

³⁵⁶ Art. 25(1), ICSID Convention

³⁵⁷ Report of Executive Directors on Convention on Settlement of Investment Disputes Between States and Nationals of Other States, 1965, §23

³⁵⁸ C.B.Lamm, ICSID Review – F.I.L.J., 1991, Vol.6, N°2, p464; see also *Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*, Decision of 6 July 1975, Year Book of Commercial Arbitration, 1979, Vol N°4, p.206

³⁵⁹ A.Broches, *A Guide for Users of the ICSID Convention*, News from ICSID, 1991, N°1, p.6

³⁶⁰ M.Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes*, Martinus Nijhoff Dordrecht ed., 1993, p.48

³⁶¹ ICSID Case N° ARB/87/3

no arbitration clause in the contract) and *SPP v. Arab Republic of Egypt*³⁶² (case of an Investment Law).

In fact, the Centre has always construed its scope of Intervention with a large view. In the *Holiday Inns v. Morocco*³⁶³ case, the Centre decided to hear the case although neither of the principal claimants signed the agreement containing the arbitration clause. The arbitrators decided that the agreement signed by Morocco gave to the claimants the rights to use ICSID³⁶⁴.

Given that the arbitration clause can be found in three kinds of agreement, there were some conflicts. But again, the Centre has adopted a broad interpretation of its intervention. Argentina was involved twice: in the first case, the BIT gave the chance to use ICSID whereas the contract gave jurisdiction to the Argentinean national courts³⁶⁵. In the second one, the BIT allowed the investor to choose among certain tribunal including ICSID whereas the contract elected exclusively the Argentinean Courts to hear the case³⁶⁶. However in this second case, the *ad hoc* committee partially annulled the award because the arbitral tribunal decided that the contractual disputes should be settled according to the clause stipulated in the contract³⁶⁷.



The decision of the *ad hoc* committee deserves credit as it has clarified the situation. Indeed, if the breach claimed by the arbitrator is based on the BIT (e.g. breach of a fair and equitable treatment), the provisions of the BIT (notably the dispute settlement clause) will apply. On the other hand, if a contractual breach occurs, the settlement of disputes provision of the contract shall apply³⁶⁸. Lastly, it is important to understand that if the claim based on the BIT entails to examine the eventual contractual claims, the provision of the BIT shall prevail³⁶⁹, however, if the claim is purely contractual, the clause dealing with settlement dispute must be followed³⁷⁰.

³⁶² ICSID Case N° ARB/84/3

³⁶³ ICSID Case N° ARB/72/1

³⁶⁴ C.B.Lamm, ICSID Review – F.I.L.J., 1991, Vol.6, N°2, p464

³⁶⁵ *Lanco v. Argentina*, Decision of 8 December 1998, ICSID Reports, N°5, p367, §32

³⁶⁶ *CAA and CGE v. Argentina*, Decision of 21 November 2001

³⁶⁷ *Ad hoc* committee, partial annulment of 3 July 2002, ICSID Review – F.I.L.J., 2001, p.659, §40

³⁶⁸ J.-M. Loncle, *The Arbitration Option in Protection of Investment Treaties: Treaty Claims v. Contracts Claims*, IBLJ, 2005, N°1, p.9

³⁶⁹ *ibid*, p.10

³⁷⁰ *SGS v. Philippines*, Decision of 29 January 2004; available at www.worldbank.org/icsid

4.2.1.2. The Hosting Contracting State

This provision is essential and logical. The only requirement is that the Contracting State must be a member of the Centre at the date of submission to the dispute and not at the date of the signature of the agreement³⁷¹. The *Holyday Inns*³⁷² case is an example of that.

A State can use Immunity to delay the procedure or worse to make the award unenforceable. There are two different immunities: immunity from jurisdiction (entering into an arbitration procedure) and immunity from execution (the State refuse to enforce the award)³⁷³. But even though Article 55 of the Washington Convention does not impede the States to use Immunities, it would be contradictory to sign such a convention and still be willing to use such measures. Moreover, this kind of attitude could have terrible effects on the States diplomatically (what kind of State does not fulfil its commitments?) and economically (no investor would be interested in working with such a state).

Regarding the Constituent Subdivision and Agencies, the question is more complicated. Article 25(3) of the Washington Convention provides that the approval of the State is necessary to the jurisdiction of the Centre when these kinds of entities are involved in an investment contract. Nevertheless, the State can provide a list of entities for which the approval is unnecessary. On the contrary, some African States decided to warn the Centre that further conditional approval will be necessary to contract with certain entities: for instance, Nigeria designated in 1978 the Nigerian National Petroleum Corporation (NNPC)³⁷⁴

The ICSID case law is useful to solve some problems. Facing a Federal State, the *Metalclad*³⁷⁵ case found it responsible for the acts committed by its local subdivisions and reinforced the “*normal State responsibility*” rule. Besides, in the *CAA and CGE v. Argentina* case, the arbitrators decided that the State is liable for unlawful acts committed by its local entities according to international law³⁷⁶.

³⁷¹ C.B.Lamm, ICSID Review – F.I.L.J., 1991, Vol.6, N°2, p.468

³⁷² see footnote 344

³⁷³ R.Boivin, *International Arbitration with States: an Overview of the Risks*, Journal of International Arbitration, 2002, Vol.19, N°4

³⁷⁴ A. A. Asouzu, Cambridge University Press, 2001, p.271

³⁷⁵ *Metalclad Corporation v. United States of Mexico*, ICSID Case N° ARB/AF/97/1

³⁷⁶ J.-M. Loncle, IBLJ, 2005, N°1, p.6-7

The States do not always play their role. If the investor does not ask if an approval is necessary, it is very rare that the State will spontaneously do so. It can therefore be strongly advisable to ask this kind of question when approaching a State for an investment contract. Nonetheless, the *CAA and CGE v. Argentina* case law made the lack of designation to the Centre by the State of its constituent body useless to determine the competence of the Centre³⁷⁷

4.2.1.3. National of Another Contracting State

The case of a natural person does not create a lot of problems since the nationality is the element to take into account both on the date of agreement to arbitration and on the date when the request for arbitration is registered³⁷⁸. In the case of an investor with dual nationality, the Convention cannot be used (Art. 25(2)(a)).

The question is more interesting with a legal entity because most of the investments are made through a corporation³⁷⁹. The hypothesis of a company incorporated in another contracting party does not raise issues. The complex situation is when the investor is bound to set up a business locally. In those circumstances, the Washington Convention (Art. 25(2)(b)) provides that an agreement between the parties can treat the local firm “as a national of another Contracting State”. The question concerned the form of this agreement. In the *Holyday Inns v. Morocco* case, the tribunal decided that the consent between the parties must be clear (explicit) or that the intention of the parties raise no doubt, due to specific circumstances. An evolution appeared with three other cases: *Amco Asian v. Indonesia*, *Klöckner v. Cameroon*³⁸⁰ and *LETCO v. Liberia*³⁸¹. In these matters, the tribunals declared that the agreement to treat the partner of the Host Country as a national of another Contracting State was implied when the Host Country accepted ICSID Arbitration.

These decisions had the effects of expanding hugely the jurisdiction of the Centre³⁸². Nevertheless, the jurisdiction of the Centre was again widened with another decision, the *SOABI v. Senegal*³⁸³ case. In this affair, the investor company had been incorporated in a non-

³⁷⁷ J.-M. Loncle, IBLJ, 2005, N°1, p.6-7

³⁷⁸ A. Broches, News from ICSID, 1991, N°1, p.5

³⁷⁹ A. A. Asouzu, Cambridge University Press, 2001, p.272

³⁸⁰ ICSID N° ARB/81/2, Y.B. Com. Arb., 1985, p.71

³⁸¹ ICSID N° ARB/83/2

³⁸² C.B.Lamm, ICSID Review – F.I.L.J., 1991, Vol.6, N°2, p464

³⁸³ ICSID ARB/82/1, ICSID Rev. – FILJ, 1991, p.119

Contracting State but was controlled by businessmen from a Contracting State. The tribunal decided that the requirement of “foreign control” was fulfilled and therefore that the Centre had jurisdiction. This decision was highly criticised³⁸⁴ mainly because this decision rewrites the ICSID Convention in adding “an indirect control” possible to give jurisdiction to the Centre. Whatever the criticisms are, one can observe that since all these decisions, the involvement of the Centre in International Investment Disputes is much more important and therefore prevents the national courts to interfere with Investments. The advantages of Arbitration over Litigations must be repeated to see the positive points these decisions brought.

Finally, it is important to evoke the interference BITs can have when dealing with the definition of “national of another Contracting State”. The agreement necessary to treat a local company as a national of “another Contracting State” should be between the parties and is difficult to understand in a treaty between two States because it is not their aim³⁸⁵. They add to the confusion in adding other definition³⁸⁶ and their application in the time complicates the matter³⁸⁷.

4.2.1.4. A legal Matter



The Convention does not define the term “legal matter”. One of the best answers was given in the Report of the Executive Directors of the World Bank: “the dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation”³⁸⁸.

During the elaboration of the Convention, a representative asked for a definition³⁸⁹ and Aron Broches answered that “[L]egal character was given to a dispute when a party claimed that a legal right had been infringed and that it was not merely moral, commercial or political misbehaviour that was in question”³⁹⁰.

³⁸⁴ A. A. Asouzu, Cambridge University Press, 2001, pp.286-293

³⁸⁵ UNCTAD, *BITs in the 1990s*, p.37

³⁸⁶ A. A. Asouzu, Cambridge University Press, 2001, pp.301; for instance, Art.1(b), of the South Africa/Netherlands BIT

³⁸⁷ *ibid*, p.303

³⁸⁸ Report of Executive Directors, 1965, §26

³⁸⁹ the anecdote comes from A. A. Asouzu, Cambridge University Press, 2001, p.240

³⁹⁰ A. Broches, *Bilateral Investment Treaties and Arbitration of Investment Disputes*, in Schultsz and Van den Berg, *The Art of Arbitration*, Kluwer, 1982

4.2.1.5. An Investment

Like the UNCITRAL Model Law about “commercial”, the Washington Convention does not give a definition of “investment”. But this time, there is no clue. The Convention rather relies on the compulsory consent of the parties³⁹¹. The lack of definition is useful as the parties are free to decide whether their operation is an “investment” or not. It allows the Convention to adapt to “innovative patterns of investment” not foreseen in 1965³⁹².

However, Article 25(4) allows every Contracting States to notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre³⁹³.

The role of the BITs are here very important as they most of the time give a definition of the term “investment”. It is striking to notice that most of the developing countries in Africa have included a broad definition of “Investments”. They usually give a list of typical sectors where “investments” are present (shares, bonds, intellectual property,) but precise that this list is not exclusive³⁹⁴.

This trend in the BIT is general and it will just give more power of intervention for the Centre. This broad definition was even followed in an ICSID Arbitration: the *Fedax* case where the arbitrators ruled in the light of a BIT between the two countries (Venezuela and the Netherlands) which provide a definition similar to the one seen above³⁹⁵.

In spite of this wide definition adopted in the BITs and by the Centre, there is a recent case which gave elements an “investment” must have. The arbitrators in this case³⁹⁶ decided that an investment is characterised when the following elements can be found: (i) some contributions [in capital, cash or kind], (ii) a certain lapse of time of performance, (iii) a participation by the investors to the risks related to the investments and (iv) a contribution to the economic development of the host country. It is interesting to note that the latter definition

³⁹¹ Report of Executive Directors, 1965, §27

³⁹² M.Hirsch, Martinus Nijhoff Dordrecht ed., 1993, p.59

³⁹³ updated periodically in www.worldbank.org/icsid

³⁹⁴ Art. 1(a) of the Nigeria/UK BIT; art. 1(1) of the Sweden/Egypt BIT; art. 1(1)(b) of the Cameroon/US BIT and concerning South Africa, Art.1(a) of the BIT with UK and art.1(a) of the BIT with the Netherlands

³⁹⁵ Art. 1(a) of the Netherland/Venezuela BIT

³⁹⁶ *Salini Costruttori Spa & Italstrade Spa v. Morocco*, Decision of 23 July 2001, available in International Legal Materials, 2003, p.609, §52

is very close to the ones found in some Investment laws passed by certain host countries which take their interests into account to define “Investment”³⁹⁷.

Even with an absence of definition, one can notice the natural trend from practitioners (through the Centre) and Countries to broaden the definition of “investment”. It may be one of the keys; South Africa will have to follow this trend to see an International Arbitration Act works in practice. The Washington Convention would not have been such a success if Countries had not accepted to sign and implement it. Arbitration never works without the support of the States.

4.2.2. The procedure

The consent to ICSID arbitration excludes any other remedy (Art.26) and if the Contracting States can require the exhaustion of the local courts to accept ICSID jurisdiction, this condition has rarely been imposed³⁹⁸.

The process is similar to those provided by Arbitral Institutions. The Centre intervenes when there is a problem (appointment of arbitrators, for instance, Art.38) but the parties have important autonomy.



The award is binding and not subject to appeal (Art.53). However, the Convention provides some remedies: the interpretation of the meaning or scope of the award (Art.50), revision because new facts of decisive importance were discovered (Art.51) and annulment by an *ad hoc* committee³⁹⁹. Concerning this last remedy, the *Klöckner v Cameroon* case showed troubles can occur. A first award was issued in October 1983. It was annulled by an *ad hoc* committee in May 1985. A new ICSID tribunal was formed and made an award in January 1988. Both parties sought annulment but were dismissed by a second *ad hoc* committee in June 1990 (over 9 years of proceedings from the request of ICSID arbitration)⁴⁰⁰. Other cases involved a long procedure (eg: *MINE v. Guinea*⁴⁰¹) and some authors criticised severely the ICSID annulment procedure⁴⁰². However, the little number of cases which led to annulment

³⁹⁷ Section 2 of the Zambian Investment Act of 1993 and section 32 of the Nigerian Investment Promotion Commission Act of 1995

³⁹⁸ Israel imposed this condition but withdraw it, in C.B.Lamm, ICSID Review – F.I.L.J., 1991, Vol.6, N°2, p467

³⁹⁹ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 57

⁴⁰⁰ ICSID N° ARB/81/2, Y.B. Com. Arb., 1985, p.71: idid, p.56

⁴⁰¹ ICSID N° ARB/84/4

⁴⁰² Craig, *Uses and Abuses of Appeal from Awards*, Arbitration International, 1998, Vol.4, N°3

and the necessity of a certain control over the awards made the idea of an *ad hoc* committee a really good one⁴⁰³.

Finally, the ICSID Convention distinguishes the recognition and enforcement of the award from its execution. The system in place is a unique control of the award made by the Centre whose decision binds the Contracting States (Art.53). The recognition and enforcement of an ICSID award are easy to get as the party seeking such a measure just has to furnish to the competent court a certified copy of the award (Art.54(2)). On the contrary, execution is governed by the law of the State in which execution is sought (Art.54(3)) and therefore can be challenged by immunity from execution. For instance, in the *LETCO* case, Liberia relied on immunity from execution as the assets seized were sovereign and not commercial: immunity worked⁴⁰⁴. The best way to avoid immunity from execution is a clause in the investment contract providing that the State waive this immunity.⁴⁰⁵

Despite these two drawbacks, the Washington Convention has many advantages that South Africa should take into consideration.

4.3. The advantages in signing the Washington Convention

As stated above, South Africa has not signed the Washington Convention yet. Nevertheless, in some of the BITs signed by this country, resort to ICSID in case of dispute settlement can be found. This situation was a bit complicated until ICSID in 1978 established the *Additional Facility*⁴⁰⁶. These rules allow the Secretariat of the Centre to administer arbitration procedures falling outside the ICSID's jurisdiction⁴⁰⁷. Therefore, as South Africa is not a Contracting State, any investment dispute will be out of the scope of the Washington Convention but with these Rules, the Centre may intervene.

However, since the procedure under these rules is outside the provisions of the ICSID Convention, the national laws will apply⁴⁰⁸. Therefore a local court will have its ordinary

⁴⁰³ A.S.El-Kosheri, ICSID Review – F.I.L.J., 1993, Vol.8, N°1, p.113

⁴⁰⁴ A. A. Asouzu, Cambridge University Press, 2001, p.382-383

⁴⁰⁵ *ibid*, p.388

⁴⁰⁶ available at <http://www.worldbank.org/icsid/facility/facility.htm>

⁴⁰⁷ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 57-58

⁴⁰⁸ F.G. de Cossio, *The International Centre for Settlement of Investment disputes – The Mexican Experience*, Journal of International Arbitration, 2002, Vol.19, N°3

powers to refuse recognition and enforcement to an international arbitral award. In South Africa, it means that the Arbitration Act of 1965 will be used.

This situation can no longer exist in South Africa considering the tremendous advantages in adopting the Washington Convention. The signature of this Convention would be a strong sign that South Africa wants to create a good environment for international arbitration and for FDIs as the link between the two is obvious⁴⁰⁹. Besides, South Africa is one of the remaining States that have not signed the Convention yet and it is getting harder and harder to justify⁴¹⁰. Thirdly, the situation would be logical as some of the BITs signed by South Africa forecast a resort to ICSID proceedings. Finally, over the past 20 years, the Centre has proved its utility in providing supportive services (notably knowledgeable and efficient staff⁴¹¹) at a modest cost⁴¹² and respecting basic rules such as the autonomy of the parties, the reduction of the intervention of national courts and in offering a unique system dealing with investor/state arbitration.



⁴⁰⁹ D.W.Butler & E.Finsen, *Arbitration in Africa*, Kluwer Law International, 1996, p.199

⁴¹⁰ A.A.Agyemang, *African States and ICSID*, CILSA, 1988, Vol.21,

⁴¹¹ J.Paulsson, *ICSID Review – FILJ*, 1991, Vol.6, N°2, p.394

⁴¹² *ibid*, p.395

Chapter 5: Improving the Recognition and Enforcement of Arbitral Awards

The effectiveness of Arbitration, compared with Litigation, is based on the fact that it is easier to enforce an award than a judgement⁴¹³. The advantage of Arbitration is mostly due to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. This Convention is an undoubted success with 134 Contracting Parties⁴¹⁴. South Africa signed it and passed the Recognition and Enforcement of Foreign Arbitral Award Act No 40 of 1977. Nevertheless, this act has some serious defaults pointed out by the South African Law Commission. In spite of these drawbacks, this Convention has played an essential role in the development of Arbitration.

5.1. Background of the Convention

The recognition and enforcement of arbitral awards have always participated in the effectiveness of Arbitration. The precedent treaties dealing with this matter were the 1923 Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards⁴¹⁵. These two Conventions were massive archaism at the end of the Second World War due to the period of decolonisation⁴¹⁶. The United Nation decided to elaborate a Convention on the Recognition and Enforcement of Arbitral Award due to the increase and development of commercial activities. Besides, the New York Convention improves the system of the previous Conventions. First, under the New York Convention, the award does not need to be “final” but only “binding” to be enforceable: the “double exequatur rule” is therefore suppressed⁴¹⁷. On the other hand, the burden of the proof to challenge the recognition or enforcement of the award has shifted from the applicant (under the Geneva Convention) to the party contesting the enforcement⁴¹⁸.

The New York Convention applies only to “foreign” awards, meaning awards made outside the country in which recognition or enforcement is sought or to awards not considered as “domestic” awards in the State where the recognition and enforcement are sought (Art.I(1)). It

⁴¹³ M. Wang,, Arbitration International, 2000, Vol.16, N°2

⁴¹⁴ available at <http://arbitrator.wipo.int/arbitration/ny-convention/parties.html>; ratifying this Convention is seen by an author as a great strides towards Arbitration (J. Paulsson, Arbitration in Africa, Kluwer Law International, 1996 p.40)

⁴¹⁵ A. A. Asouzu, Cambridge University Press, 2001, p.179

⁴¹⁶ *ibid*, pp.180-186

⁴¹⁷ P. Fouchard, *La Portée de l'Annulation de la sentence arbitrale dans son pays d'origine* («The Consequences of the setting aside of an award in the country of Origin»), *Revue de l'Arbitrage*, 1997, N°3, p.329

⁴¹⁸ A. A. Asouzu, Cambridge University Press, 2001, p.185

gives the grounds on which recognition or enforcement can be refused (Art.V)⁴¹⁹ in view of harmonizing that issue.

5.2. The defects of the 1977 Act

South Africa signed and ratified the New York Convention and it entered into force through the Recognition and Enforcement of Foreign Arbitral Awards Act 1977. The country made no declaration about reciprocity⁴²⁰ or commerciality⁴²¹ and provides the same grounds for recognition and enforcement as the 1958 Convention⁴²²: these are good signs towards Arbitration. However, the Act suffers from defects. This paper will focus on two of them.

5.2.1. The lack of a provision equivalent to Article II of the New York Convention

It has already been seen that the South African judicial system does not recognize the severability of the arbitration clause from the whole contract⁴²³ which hinders the development of Arbitration.

Although the implementation of the Model Law will change that situation (notably the Article 8)⁴²⁴, the 1977 Act should have included a provision equivalent to Article II of the New York Convention giving a full effect to the arbitration agreement.



5.2.2. The scope of intervention of the national courts

Reading the 1977 Act gives the impression that the South African courts have important powers. In fact, it is the use of the term “may” in Section 2(1)⁴²⁵ that creates this idea. This section is supposed to implement Article III of the New York Convention. Nevertheless, the Convention uses “shall” and not “may” to ease the enforcement of foreign arbitral awards as domestic arbitral awards. The New York Convention limits strictly the exceptions whereas the 1977 Act gives arbitrary powers to its national judges.

⁴¹⁹ see footnote 331 and the other grounds: non-arbitrability of the matter and public policy.

⁴²⁰ The New York Convention will only be effective if the foreign arbitral award is coming from a contracting State; this declaration was notably made by Nigeria or Madagascar

⁴²¹ The importance of a definition of “commercial” in this situation is crucial, see A. A. Asouzu, Cambridge University Press, 2001, p.194 (Nigeria and Madagascar made this declaration as well)

⁴²² Sec.4, Recognition and Enforcement of Foreign Arbitral Awards Act of 1977

⁴²³ *Fassler, Kamstra and Holmes v. Stallion Group of Companies (Pty) Ltd.*, 1992 (3) SA 825 (W), footnote 243 (cf *supra* pp.35-36)

⁴²⁴ 1998 SALC Report, § 3.56, p.122

⁴²⁵ Section 2(1) provides that: “any foreign arbitral award may, subject to the provision of sections 3 and 4, be made an order of court by any court”

This section 2(1) is in accordance with the spirit of the Arbitration Act of 1965 in granting powers as wide as possible to the courts⁴²⁶. However, this trend should be stopped if South Africa is to adopt the Model Law and Section 2(1) should be changed to follow the wording of the New York Convention and change this “may” in “shall” in order to frame the powers of the courts.

Other shortcomings in the 1977 Act can be pointed out, notably the definition of a “foreign arbitral award”⁴²⁷ which is a crucial matter if one does not want to see a situation like in India with the *Singer* case⁴²⁸, the failure to make express provision for the recognition as opposed to their enforcement⁴²⁹ and the impression that the arbitration agreement can be invalid vis a vis two laws (the one decided by the parties and the one on the country where the award was made⁴³⁰) whereas the 1958 Convention provides the same possible invalidity but suggests that it is only subject to one law (either of the laws mentioned above, Art V(1)(a)).

5.3. The Advantages and Drawbacks of the New York Convention

The recognition and enforcement of arbitral awards play an important role in arbitration⁴³¹ and the New York Convention is linked to this. Its success created a good soil for the movement of awards: M. Van den Berg thanks to statistics showed that on 700 awards coming from 35 different countries, enforcement had been ordered in 95%⁴³². These kinds of figures are better than anything else to illustrate how important the New York Convention is.

The Convention constitutes progress compared with the Geneva Convention of 1927. Its main merit is to have established the grounds on which recognition and enforcement of an award

⁴²⁶ The Common-Law gives even more powers to the court which for instance has the discretion not to enforce the arbitration agreement (*Van Herdeen v. Sentral Kunsmis Korporasie (Edms) Bpk*, 1973 (1) SA 17 (A) 26B) or to interfere with the procedure rules while the arbitration is in progress (*Tuesday Industries (Pty) Ltd v. Condor (Pty) Ltd*, 1978 (4) SA 379 (T) 383F-H). Nevertheless, a South African Court has the power to enforce a foreign arbitral award under the Common-Law as a contractual obligation (*Benidai Trading Co Ltd v. Gouws and Gouws (Pty) Ltd*, 1977 3 SA 1020 (T) 1038H). See D.W.Butler & E.Finsen, *Arbitration in Africa*, Kluwer Law International, 1996, p.202

⁴²⁷ R.H. Christie, *Arbitration International*, 1993, Vol.9 N°2

⁴²⁸ AIR 1993 SC 998, the *Singer* case decided to treat as domestic award, one made outside India because the substantive law applying to the dispute was Indian. The said award was therefore subject to the full rigour of the 1940 Arbitration Act. This approach had terrible effects on India as a partner for international companies.

⁴²⁹ 1998 SALC Report, § 3.69-3.70, pp.125-126

⁴³⁰ Art.4(1)(b)(1) of the 1977 Act

⁴³¹ A. A. Asouzu, Cambridge University Press, 2001, p.210

⁴³² E.Loquin, *The Enforcement of International Arbitral Awards at the Beginning of the Third Millenium, Assessment and Survey*, IBLJ, 2003, N°7, p.757

can be challenged⁴³³ and to oblige the Contracting States not to add other grounds⁴³⁴. Finally, Article V confers the nature of an order to any award in itself.

Unfortunately, all these great strides towards the expansion of Arbitration do not prevent the New York Convention from having serious drawbacks. Firstly, this Convention does not provide the condition for an arbitral clause to be valid and rather relies on national laws to complete this task. It has therefore chosen the “conflict of law rule” as a general principle which is against its first will of harmonization and creates legal uncertainty⁴³⁵. Secondly, Article V(1)(e) provides that the recognition and enforcement of an award is excluded if the award is set aside by the court “of the country in which, or under the law of which, the award was made”. This article consequently allows any country to set aside the award made in its territory on any ground⁴³⁶ and some national particularities can interact with a system supposed to uniform the rules of laws and can have some terrible effects.

5.4. The remedies to these drawbacks

5.4.1. The limited effects of the “Public Policy” exception

One of the grounds to refuse enforcement of an award is the exception of “public policy”. This exception with no real borders⁴³⁷ can be used by a court to refuse enforcement because the arbitral tribunal did not take into account the laws of the enforcing state⁴³⁸. The case was notably shown in the *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁴³⁹ where the Supreme Court recognised the arbitrability of the matter though the arbitral award did not take the Sherman Act into consideration.

One can see the drawbacks of the system implemented by the New York Convention. However, two endeavours manage to reduce the impact of the “public policy” exception. On one the hand, the laws of certain countries⁴⁴⁰ have specified that an award is contrary to the

⁴³³ A. Redfern & M. Hunter, Sweet and Maxwell, 1999, p. 461

⁴³⁴ E.Loquin, IBLJ, 2003, N°7, p.749

⁴³⁵ *ibid*, p.751

⁴³⁶ P. Fouchard, ”The Consequences of the setting aside of an award in the country of Origin”, *Revue de l’Arbitrage*, 1997, N°3

⁴³⁷ It most of the time depends on moral values and the idea of justice countries have; see A.I. Okekeifere, *The Enforcement and Challenge of Foreign Arbitral Awards in Nigeria*, *Journal of International Arbitration*, 1997, Vol.14, N°3

⁴³⁸ R.H. Diwan, *Problems associated with the Enforcement of Arbitral Awards revisited Australian Consumer Protection; Conflict of Law; An English Law Perspective*, *Arbitration International*, 2003, Vol.19, N°1

⁴³⁹ 473 U.S. 614 (1985)

⁴⁴⁰ Zimbabwe, Australia or Bermuda for instance

public policy if the award is affected by fraud or corruption or a breach of the rules of natural justice⁴⁴¹. All these regulations want to avoid any doubts this notion involves. One can see that the States show a positive attitude to make this exception less unforeseeable. On the other hand, the courts played a great role in ruling that “the notion of public policy should be construed narrowly”⁴⁴².

These trends made the “public policy” exception less important than it seemed⁴⁴³

5.4.2. The practice of the setting aside of awards in the country of origin

The New York Convention does not give the grounds on which a setting aside can be ordered by the courts of the country of origin but gives the effects of it: refusal of recognition and enforcement in any other countries. It can have some terrible consequences on the system made by the Convention since every country can regulate such grounds as they want. In terms of harmonization, it is a kind of failure: an author even said that this situation was the “Trojan horse”⁴⁴⁴ of the 1958 Convention.

However, like in other business matters, this dramatic system has been softened in two ways. In the first instance, the Geneva Convention of 1961, prepared by the UN, but only applicable in Europe, decided that the setting aside of an award in the country of origin will have effect only if that was motivated by the first four grounds of article V of the New York Convention (Article IX, Geneva Convention). This meant that the setting aside of the award for non-arbitrability of the matter or for non-compliance with the “public policy” had no effects on the enforcement of that award in another Contracting State⁴⁴⁵. That Convention did not call the New York system into question but just limited the grounds for setting aside⁴⁴⁶, grounds which were subject to the particularities of each country.

⁴⁴¹ some authors said that there are two notions under “public policy”: “the truly international public policy” (corruption, fraud and rules of natural justice) and the domestic ones (consumer protection laws, competition law...) and that an international award should only be challenged under the first category (for instance O. Chukwumerije, *Mandatory Rules of Law in International Commercial Arbitration*, *Revue Africaine de Droit International Comparé*, 1993, Vol.5, p.576-579

⁴⁴² eg: *Renusagar Power Co. Ltd. v. General Electric Company*, *Yearbook of Commercial Arbitration*, 1995, Vol.20, p.681

⁴⁴³ M.A.Buchanan, *Public Policy and International Commercial Arbitration*, *American Business Law Journal*, 1988, Vol.26, p.519

⁴⁴⁴ E.Loquin, *IBLJ*, 2003, N°7, p.751

⁴⁴⁵ P. Fouchard, “The Consequences of the setting aside of an award in the country of Origin”, *Revue de l'Arbitrage*”, 1997, N°3

⁴⁴⁶ *ibid*

The second way the New York system was moderated is due to the attitude of the judges in the enforcing States. Indeed, in several cases (the most famous are the *Norsolor*⁴⁴⁷ and *Hilmarton*⁴⁴⁸ cases in France and the *Chromalloy*⁴⁴⁹ case in the United-States), judges in an enforcing state decided to overcome the annulment of the award in the country of origin. They all decided so, using the Article VII of the New York Convention which provides the recognition or enforcement in case of a more “favourable local law”⁴⁵⁰ compared to the provisions of article V. The possibility of setting aside the provisions of the 1958 Convention in favour of local rules is in fact included in that convention⁴⁵¹. The French and American judges therefore respected the spirit of the New York Convention. In France, for example, it is article 1502⁴⁵² of the New Code of Civil Procedure which was used in the cases abovementioned to accept the enforcement of the award annulled in the country of origin.

All these decisions were criticised because they decided the enforcement of an award which had no judicial strength in the country of origin and because it created a complete disorder in International Arbitration denying the New York system⁴⁵³. It is true that it creates a kind of *forum shopping* regarding the national regulation more or less favourable to Arbitration and the enforcement of awards (South Africa could have an interesting point here in softening the grounds on which recognition could be sought). But whatever the criticisms are, no one can deny that the exception of the more favourable rule was in the original text of the New York Convention and that the authors had foreseen that such a provision would have positive effects on the enforcement of foreign arbitral awards⁴⁵⁴. They were right and the French and American judges ruled in a way which must be enlarged because it will just facilitate the development of Arbitration throughout the World.

⁴⁴⁷ Cass. civ. 1^{re}, 9 October 1984, *Revue de l'Arbitrage*, 1985, p.431 (award set aside in Austria, enforced in France)

⁴⁴⁸ Cass. civ. 1^{re}, 23 March 1994, *Revue de l'Arbitrage*, 1994, p.327 (award set aside in Switzerland, enforced in France)

⁴⁴⁹ US District Court (District of Columbia), 31st July 1996 (award set aside in Egypt, enforced in the United-States)

⁴⁵⁰ A. Redfern & M. Hunter, *Sweet and Maxwell*, 1999, p. 483

⁴⁵¹ A.J. Van den Berg, *The New York Arbitration Convention of 1958*, Kluwer Deventer, 1981, pp.82-83

⁴⁵² According to this article, the setting aside of the award in the country of origin does not constitute a ground for refusal of enforcement

⁴⁵³ P. Fouchard, "The Consequences of the setting aside of an award in the country of Origin", *Revue de l'Arbitrage*, 1997, N°3

⁴⁵⁴ *ibid*

5.5. The interactions with the Model Law

Due to the existence of the New York Convention, one can imagine that the part, in the UNCITRAL Model Law related to the recourse against award (Chapter VII) and the recognition and enforcement of awards (Chapter VIII) are useless. On the contrary, these chapters are essential to consider when drafting an international arbitral act⁴⁵⁵.

Primary, the scope of intervention of these two instruments are not the same: the UNCITRAL Model Law will not apply to genuine domestic arbitration unless the opting-in option has been implemented by the State (it is the case for South Africa following this paper). It will not apply either for non-commercial arbitration whereas the New York Convention can be used. It can be seen that in some cases (domestic arbitration made outside the country, article 1(3)(b)(i) of the Model Law), both instruments can play. In these circumstances, some countries decided that regarding the enforcement of an award, the New York Convention shall prevail⁴⁵⁶.

Secondly, unlike the New York Convention, the Model Law which just repeats Article V of the 1958 Convention⁴⁵⁷ gives the grounds for setting aside an award. Therefore, what the New York Convention does not mention, the Model Law of UNCITRAL does⁴⁵⁸. The Model Law corrects a mistake and allows a kind of harmonization in a field which lacks some. South Africa would have inspiration in specifying the grounds of setting aside of the Model Law, just like Peru⁴⁵⁹.

Thirdly, unlike the New York Convention, the Model Law system does not stick to the place of arbitration (important element when the country has adopted the reciprocity declaration when adopting the 1958 Convention, like Nigeria)⁴⁶⁰. The same remark can be made about the nationalities of the parties which are irrelevant under the Model Law⁴⁶¹.

To conclude, it would be wise that South Africa in an International Arbitration Act models the grounds for setting aside, recognition and enforcement on the grounds of the Model Law.

⁴⁵⁵ P.Sanders, *Arbitration International*, 1995, Vol.11, N°1

⁴⁵⁶ Art.20, Australian International Arbitration Act or Art.28 of the International Conciliation and Arbitration Act 1993 of Bermuda

⁴⁵⁷ some authors criticise this repetition; see E.Loquin, *IBLJ*, 2003, N°7, p.758

⁴⁵⁸ see footnote 467

⁴⁵⁹ see footnote 333

⁴⁶⁰ A.A Asouzu, *Journal of Business Law*, 1999, p.199

⁴⁶¹ *ibid*, p.200

That would clarify the situation which can become complicated due to the overlap of the Model Law and the New York Convention on these matters.

It can be seen that the New York Convention has a tremendous part to play in the expansion of Arbitration; like the UNCITRAL Model Law and the Washington Convention. Nonetheless, Arbitration can not spread without the willingness of the countries (signing and ratifying conventions) and especially the national courts.

The drafting of an International Arbitration Act in South Africa is an important step. But however important this step is, International Arbitration will not expand in South Africa if some changes are not done on the practitioners' level. This paper will give some ideas and lines that should be followed in order to see investors come into the country since they will trust this country "as a venue for International Commercial Arbitration"⁴⁶².



⁴⁶² to take the expression from R.H. Christie, *Arbitration International*, 1993, Vol.9 N°2

Chapter 6: Other actions to foster foreign investments

6.1. Adopting a better attitude towards Arbitration in Practice

The World War II was a key event in the expansion of International Arbitration. Before the war, countries and judges were hostile to this way of resolving disputes: it was the time of individualism. The necessary reconstruction after the war saw the development of diplomatic relations and among them, commercial relations in a complete opposite way: Arbitration benefited from this attitude⁴⁶³.

Following this orientation, many States passed regulations on arbitration, not only in the industrialised countries but also in developing ones (Nigeria, Tunisia, Mexico) helped in some cases by the UNCITRAL Model Law. The legislation is the first step but not the only one at all⁴⁶⁴. This paper will focus on the other actions South Africa will have to take to develop Arbitration.

6.1.1. The Situation in South Africa

South Africa is peculiar in Africa because its judicial system is seen as reliable. Judges are efficient and the system to appoint them is working well⁴⁶⁵. Therefore, ADR are not to be developed because of the lack of a judicial system, but more because it attracts investments and promotes a good administration of Justice in relieving the burden of the courts⁴⁶⁶.

However, some initiatives were taken to develop ADR organisations in that country. On one hand, there is the Association of Arbitrators (Southern Africa)⁴⁶⁷, created in 1979 by professionals in the construction industry. Its objectives are the promotion of wider use of arbitration, the formulation of rules⁴⁶⁸ and the training of arbitrators⁴⁶⁹. The number of

⁴⁶³ J. Paulsson in *Arbitration in Africa*, Kluwer Law International, 1996, p.33

⁴⁶⁴ Q.Tannock, *Colloquium on International Commercial Arbitration and African States* held in London in June 2003

⁴⁶⁵ Judges are appointed by the President on the advice of the Judicial Service Commission (Sec.174(6), South African Constitution) which entails more transparency and has improved quality: D.W.Butler, *Colloquium on International Commercial Arbitration and African States* held in London in June 2003

⁴⁶⁶ *ibid*

⁴⁶⁷ www.arbitrators.co.za

⁴⁶⁸ the rules are quite brief but the wording can make them complicated to understand, *ibid*

⁴⁶⁹ D.W.Butler & E.Finsen, *Arbitration in Africa*, Kluwer Law International, 1996, p.216

members is stabilised for a long time mainly belonging to the construction industry⁴⁷⁰. On the other hand, the Arbitration Foundation of Southern Africa (AFSA)⁴⁷¹ was created to provide administered arbitration services, such as rules of arbitration. However, these rules are far too complex and lengthy to be useful⁴⁷². Moreover, they are both seen as organisations “representing only certain professions and organisations in the private sector”⁴⁷³. Finally, the Commission for Conciliation, Mediation and Arbitration⁴⁷⁴ is very popular but only in labour law disputes. It was created by the Labour Relations Act of 1995 but that organisation faced the competition of another institution (Tokiso Dispute Settlement (Pty) Ltd) - very active and efficient⁴⁷⁵. They are all dynamic as they provide training, draw up newsletters for their members, etc,⁴⁷⁶ nevertheless it is easy to notice that they all lack something to be a reliable organisation to promote arbitration and give an efficient framework for International Arbitration.

6.1.2. Incentives towards Arbitration South Africa can put into practice

Investors seek familiarity and predictability (especially in terms of outcome and cost)⁴⁷⁷ while coming into a country. A suitable law will be a first good reason to invest in a certain country but not a sufficient one⁴⁷⁸. States are now competing to attract as much investment as possible and a law is not enough. South Africa, while passing an International Arbitration Act should use other elements showing its willingness to welcome Arbitration.

6.1.2.1. Training people

It is important to note that all the existing arbitral organisations in South Africa provide to train people who wants to become an arbitrator. However, each organisation has its own

⁴⁷⁰ The current number is 700 and it is approximately the same since the early nineties. The proportion of lawyers is roughly 20% of the membership but the scope of intervention is still in the construction industry: *ibid*, p.216

⁴⁷¹ www.arbitration.co.za

⁴⁷² 26 pages in small print compared with the 9 pages in bigger print of the LCIA ones: D.W.Butler, Colloquium on International Commercial Arbitration and African States held in London in June 2003

⁴⁷³ *ibid*

⁴⁷⁴ <http://www.ccma.org.za/>

⁴⁷⁵ panel of 250 mediators and handle around 600 disputes each month: *ibid*

⁴⁷⁶ For instance, “how to become an arbitrator” under the Association of Arbitrators: (<http://www.arbitrators.co.za/argsnew/arb-new1.htm>) or the “training” and “newsletter” headings under the AFSA on the AFSA website.

⁴⁷⁷ Q.Tannock, Colloquium on International Commercial Arbitration and African States held in London in June 2003

⁴⁷⁸ *ibid*

course⁴⁷⁹ and at the end of the day, no unity is created, as an arbitrator from one organisation will not be recognised by another organisation. It would be simpler if the program to become an arbitrator was issued by only one organisation in the whole country, or if these programs were harmonised.

Besides the professionals who want to become an arbitrator, one profession should have special training about arbitration: the lawyers. When Arbitration appeared, lawyers were reluctant to use it. They were used to go to Courts to settle the disputes because they knew it⁴⁸⁰. However, lately, the number of lawyers aware of the advantages of Arbitration is constantly increasing thanks, notably, to the work of the Association of Arbitrators⁴⁸¹. It can also be useful to train future lawyers (ie developing courses on International Arbitration, distributing textbooks and materials sourcebooks to students during the 4th year of LLB): it is a way to create familiarity with arbitration⁴⁸². It is interesting to note that all the countries where practical arbitration is hugely developed provide such courses as part of legal studies.

Finally, Professor Butler reproaches the professional associations for having done little for the training of arbitrators and for the expansion of Arbitration⁴⁸³. The government should encourage these associations to develop the training of arbitrators among their members and to ensure that appointed arbitrators are suitable⁴⁸⁴.

One can see that if South Africa wants to welcome International Arbitration, everybody in the process (the State to take the regulation and the practitioners in every sector to act in favour of it) must be involved. Another essential character in the growth of Arbitration is the national judge.

6.1.2.2. Role of the judge

As seen above, the judge has an important role during the arbitral process (interim measures). However, African judges are most of the time unfamiliar with international law and do not

⁴⁷⁹ for the training provided by the Association of Arbitrators: D.W.Butler & E.Finsen, *Arbitration in Africa*, Kluwer Law International, 1996, p.216

⁴⁸⁰ D.W.Butler & E.Finsen, *Arbitration in Africa*, Kluwer Law International, 1996, p.218

⁴⁸¹ *ibid*

⁴⁸² Q.Tannock, *Colloquium on International Commercial Arbitration and African States held in London in June 2003* & A. A. Asouzu, Cambridge University Press, 2001, p.209

⁴⁸³ D.W.Butler & E.Finsen, *Arbitration in Africa*, Kluwer Law International, 1996, p.215

⁴⁸⁴ *ibid*: argumentation *a contrario* based on the authors' opinion

understand why they interfere their domestic sphere⁴⁸⁵. Judges have a terrible hostility towards Arbitration because they feel it takes some of their prerogatives⁴⁸⁶: their attitude must change. They should not see Arbitrators as a threat.

The importance of judges can be seen during the recognition or enforcement step. The New York Convention is a key instrument but even countries which ratified it passed regulation to frame it (the case of South Africa is symptomatic, specially with the application of the Protection of Business Act⁴⁸⁷). South Africa should therefore repeal this Act and accept in good faith the full application of the 1958 Convention: judges must enforce awards made outside South Africa even if it is against a compatriot and must refuse the “public policy” exception like other jurisdiction did⁴⁸⁸. On the other hand, awards made by foreign arbitrators must not be seen as “dodgy” ones and must be enforced even if they applied a law improperly or because their reasoning seems poor⁴⁸⁹. Finally, the costs to enforce an award must not be excessive⁴⁹⁰ and some countries decided to charge huge costs on the party challenging the award with meritless arguments⁴⁹¹.

The system will never work without the good will of the national judges: they should be proud of this importance attached to them and do everything they can not to see this system “break[s] down”⁴⁹². They have to accept to lose some control, to see this “separation of powers”⁴⁹³ implemented because they can make the system works properly. The solution is to train them so as to explain the stakes and the benefits of Arbitration⁴⁹⁴. Training is therefore one of the most important things to do if South Africa wants to develop Arbitration. Training is such an important step that only one organisation should provide it; maybe the creation of an Arbitration Centre would be appreciated.

⁴⁸⁵ A. A. Asouzu, Cambridge University Press, 2001, p.209

⁴⁸⁶ J. Paulsson, Arbitration in Africa, Kluwer Law International, 1996, p.33

⁴⁸⁷ Act 99 of 1978 which prevented the enforcement of foreign awards made against South Africa in sensitive sectors (mining) unless the Minister of Trade and Industry consents to the enforcement (Sec.1): D.W.Butler, Colloquium on International Commercial Arbitration and African States held in London in June 2003

⁴⁸⁸ In the United-States: *Parsons & Whittemore v. RATKA* (508 F.2d 969 (2D Cir. 1974)) or in England: *DST v. Rakoil And Shell International Petroleum Co.* ((1987) Lloyds Law Reports, Vol.2, p.246).

⁴⁸⁹ J. Paulsson, Arbitration in Africa, Kluwer Law International, 1996, p.32 & 43-44 (*Mitsubishi* case by the US Supreme Court in 1985 (473 US 614))

⁴⁹⁰ Art.III of the New York Convention provides that it must be the same costs as if it was a domestic one; that however can raise problems when the costs are very high to enforce a domestic award

⁴⁹¹ it is the case of France and the United-States: J. Paulsson, Arbitration in Africa, Kluwer Law International, 1996, p.45

⁴⁹² *ibid*, p.41

⁴⁹³ P.Leboulanger, *L'arbitrage et l'harmonisation du droit des affaires en Afrique* (“Arbitration and the harmonisation of business law in Africa”), *Revue de l'Arbitrage*, 1999, N°3, §96

⁴⁹⁴ *ibid*, §98

6.1.2.3. The creation of an Arbitration Centre

South Africa has several arbitral organisations but as stated above, they are not co-ordinated at all and they lack a wide range of intervention. The idea would be to create a real centre for Mediation and Conciliation which centralises all the activities linked with ADR. This kind of Centre has multiplied in Africa and in Developing countries during recent years⁴⁹⁵.

Even though a lot of these Centres have no real activities⁴⁹⁶ and a well-known author in South Africa does not call on that creation⁴⁹⁷, South Africa would be encouraged to set up a Centre⁴⁹⁸ because it is far too expensive to use institutions in Europe or in the United-States⁴⁹⁹. The other solution would be to use the organisations in other close countries like Zimbabwe or Madagascar. However, it is hard to justify why South Africa should rely on its neighbours to develop Arbitration.

Given the number of organisations⁵⁰⁰, it would not be relevant to create another one. The best thing would be to merge them into one Centre which centralises everything. The current organisations only deal with domestic organisations but it is not impossible to imagine inside an “Arbitration Centre of South Africa” some distinctions between domestic and international arbitration. Besides, these organisations have gained some important “know how” in Arbitration which could be very useful for the Centre to be efficient more rapidly.

The question would be how to finance this Centre? South Africa can borrow different ways from African countries⁵⁰¹ to answer this issue. Since the associations of professionals have not played a great role so far to develop Arbitration and that to avoid any conflict of interest, the

⁴⁹⁵ Good examples can be found in Nigeria (Lagos Regional Centre for International Commercial Arbitration), in Zimbabwe (Commercial Arbitration Centre) and in Madagascar (Arbitration and Mediation Centre of Madagascar)

⁴⁹⁶ P.Leboulanger, “Arbitration and the harmonisation of business law in Africa”, *Revue de l’Arbitrage*, 1999, N°3, §97

⁴⁹⁷ D.W.Butler & E.Finsen, *Arbitration in Africa*, Kluwer Law International, 1996, p.219: they reproach that a centre is slow to become financially independent and most of the time become a huge and slow administrative institution. The authors advise that the Association of Arbitrators could be used as an intermediary to provide support services.

⁴⁹⁸ Zimbabwe and Madagascar created their Centres while passing the international arbitration laws

⁴⁹⁹ D.W.Butler, *Journal of International Arbitration*, 2004, Vol.21, N°2

⁵⁰⁰ When creating good environment for Arbitration in Zimbabwe, there was three organisations, the Centre, the Association of Arbitrators and a branch of the LCIA which had overlapping powers: that created some difficulties which were overcome when the Centre centralised all the powers: Q.Tannock, *Colloquium on International Commercial Arbitration and African States* held in London in June 2003

⁵⁰¹ In Kenya, a Centre was created through efforts of a group of professional people, the Zambian Centre was established thanks to donor funding and the Zimbabwean one by the private sector: *ibid*

part of the State in establishing this Centre must be as small as possible⁵⁰², the idea of initiatives from economic sectors seems feasible. However, this question of finance will depend on opportunities as well.

If such a Centre is created, it must have extensive powers to expand Arbitration and its practice throughout the country. It must provide supporting services⁵⁰³, prepare arbitrators with only one training program and a single diploma, supervise the arbitral process⁵⁰⁴, organise workshops and conferences with important specialists from Europe and the United-States, draw up a Newsletter every month to promote, educate and communicate on Arbitration⁵⁰⁵ (important cases, articles explaining other Arbitration legislations), make lobbying to make Arbitration better-known in economic sectors⁵⁰⁶ and maybe improve the law.

All the action abovementioned were held in Zimbabwe and the success of this policy can be seen in the graph below.



These impressive figures are the best arguments to pass a regulation and above all to create a Centre for Arbitration in South Africa. The decrease in the graph in 2000/2001 was created by

⁵⁰² see footnote 501 where none of the examples imply the intervention of the State
⁵⁰³ travel and accommodation arrangements for the tribunal, booking venues, securing translators, proposing suitable arbitrators
⁵⁰⁴ D.W.Butler & E.Finsen, Arbitration in Africa, Kluwer Law International, 1996, p.220
⁵⁰⁵ Q.Tannock, Colloquium on International Commercial Arbitration and African States held in London in June 2003
⁵⁰⁶ lobbying is more efficient through an organisation rather than *ad hoc* work by individuals: *ibid*

the political and economical instability in Zimbabwe at this time. But one can see that during the period 1994-1999, the number of Arbitrations was multiplied by 20.

Last but not least, the question whether or not the Centre, once created, should draw up Arbitration rules is sensitive. There is no decision yet⁵⁰⁷ but like Zimbabwe or Madagascar while establishing the Centre decided to write Arbitration rules, South Africa would be wise to do the same. There are two good reasons for that: firstly, having an Arbitration Act does not prohibit doing it and secondly, as the rules made by the current organisations in South Africa are not irreproachable, that would be another stride toward a better framework for Arbitration. And like Zimbabwe, South Africa could require some help from a well-established Arbitral organisation influenced by the Common-Law system: the London Court of International Arbitration (LCIA)⁵⁰⁸. In fact, South Africa should ask the assistance of that organisation if it decides to create a Centre. Such collaboration could make the Centre more efficient rapidly and it could benefit from the trust the LCIA have with practitioners (arbitrators, business men) of the world.

6.2. Voting an Investment Law in South Africa



Arbitration is one out of many ways of fostering confidence in foreign direct investments (FDIs). Some have little impact but some are quite primordial: an investment law, for instance⁵⁰⁹. Like International Arbitration, South Africa has not passed such a regulation and again is a latecomer compared with countries on the continent⁵¹⁰. This lack can be explained by the fact that South Africa is an important market and have some natural resources (gold and diamonds): these two elements have always played a huge role in attracting investors⁵¹¹. It also benefits from a good image abroad as the political system is stable and not corrupted,

⁵⁰⁷ D.W.Butler & E.Finsen, *Arbitration in Africa*, Kluwer Law International, 1996, p.219

⁵⁰⁸ The LCIA was involved in the creation of the Zimbabwean commercial arbitration centre through a branch: Q.Tannock, Colloquium on International Commercial Arbitration and African States held in London in June 2003

⁵⁰⁹ Ibrahim Shihita shows the link between a law and foreign investments: J.W.Salacuse, *Direct Foreign Investment and the law in Developing Countries*, ICSID Rev. – FILJ, 2000, Vol.15, N°2, p.386

⁵¹⁰ Namibia in 1990, Malawi in 1991, Mozambique in 1993, Nigeria in 1995, Kenya in 2004, Angola in 2003, Zimbabwe in 2004 for examples. In fact, South Africa privileges bilateral relations through BIT: 18 were signed so far (lists available at <http://www.unctadxi.org/templates/DocSearch.aspx?id=779>).

⁵¹¹ Angola or Nigeria have always been in the same position: J.Morisset, *Foreign Direct Investment in Africa – Policies also matter*, Policy Research Working Paper 2481, The World Bank and the International Finance Corporation Foreign Investment Advisory Service, November 2000, p.1 & 3

the economy is growing⁵¹² and the infrastructures (highways, railways, airport, telecommunication facilities) are reliable⁵¹³. In fact, South Africa have always attracted investors thanks to all these positive points and therefore never made any effort to draft an Investment Law⁵¹⁴. Nevertheless, if one removes these advantages and compares South Africa with other African countries taking only into account the real actions⁵¹⁵ States made to attract Foreign Investments, South Africa is desperately at the bottom⁵¹⁶. Given this situation, passing an Investment Law is quite urgent.

Nonetheless, drafting an investment law is complicated. It will be influenced by internal political, economic and ideological considerations⁵¹⁷. Besides, different interests must be conciliated. While the country wants to attract investors⁵¹⁸, it also must bear in mind to collect money from the investments and to use it usefully⁵¹⁹. Experiences in other African countries can be used to list the points the law must tackle and to avoid some mistakes.

The law must first specify its scope: definitions of the territory, lists of the emanations of the country (regions, provinces) abide by the law, definition of “investment” generally as broad as possible even though some countries include in this definition their own interests⁵²⁰ and finally, definition of “investors”⁵²¹ which will be essential to know the sectors in which one kind of investor is allowed to invest in. Some sectors are completely excluded from foreign investments (sensitive sectors such as production of electricity, mining, petroleum, banking or

⁵¹² However, the GDP growth was due to the privatization process and the return of the companies which operated in the neighbouring countries during the apartheid; the recent GDP figures show to be too modest to attract foreign investors: J.Morisset, Policy Research Working Paper 2481, November 2000, p.8

⁵¹³ On the contrary, Africa has a bad image because it suffers from political instability, economic stagnation, bad governance, lack of rules of law: A.P.Mutharika, *Creating an Attractive Investment Climate in the COMESA Region*, ICSID Rev – FILJ, 1997, Vol.12, N°2, p.245. However, Angola and Nigeria have always attracted FDIs despite their unstable political and economic environment: J.Morisset, Policy Research Working Paper 2481, November 2000, p.2

⁵¹⁴ This attitude is at the opposite to little countries with few natural resources which have to pass an Investment Law with a lot of incentives to attract as many investors as possible (case of Malawi: A.P.Mutharika, ICSID Rev – FILJ, 1997, Vol.12, N°2, pp.252-254)

⁵¹⁵ real actions (investment law, BITs,) are opposed to natural component such as a big market and natural resources

⁵¹⁶ see the research in J.Morisset, Policy Research Working Paper 2481, November 2000, pp.3-10 and specially Table 1 and 2

⁵¹⁷ A.P.Mutharika, ICSID Rev – FILJ, 1997, Vol.12, N°2, p.250

⁵¹⁸ an investor wants low risk and good return: J.W.Salacuse, ICSID Rev. – FILJ, 2000, Vol.15, N°2, p.386

⁵¹⁹ *ibid*, p.285

⁵²⁰ Sec.2, Zambian Investment Act of 1993 or Art.6, Mozambican Investment Law of 1993

⁵²¹ Again, most of the time the definition will cover everybody but will split investors into categories: Art.2(6), Ethiopian Investment Proclamation of 1996 (“foreign investors”, “domestic investors”, Ethiopian nationals and the Government): M.P.Porter, *The Ethiopian Investment Law*, ICSID Rev. – FILJ, 1999, Vol.15, N°2, p.370

insurance⁵²²), some are opened to foreign investors only through Joint-Ventures (JV)⁵²³ and finally the rest is opened without any restrictions⁵²⁴.

Moreover, investors will be reluctant to go in a country where, to do business, a lot of approvals are necessary⁵²⁵. South Africa should follow the new principle: “every economic activity is permitted unless specified prohibited”⁵²⁶ and should reform the Trade and Investment South Africa Agency to create a real “one-stop shop”⁵²⁷ which will centralise all the powers (coordinate the applications for prospective investors, issue all the permits, provide advisory services for investors and make recommendations)⁵²⁸. On the other hand, countries must make an effort on tax⁵²⁹, on custom duties (on these two categories, bilateral tax treaties have an essential place), on foreign exchange restrictions (eg: repatriation of benefits)⁵³⁰ and on the use of land⁵³¹.

Finally, a South African Investment Law should provide protection to foreign investors and a suitable dispute settlement mechanism. The first idea covers two primordial principles for foreign investors: national treatment (foreign investors are considered as nationals) and rights

⁵²² these restrictions are not always for the benefit of the country: example is taken from the financial sector in Ethiopia which lacks reliable business information, trained bankers who know the latest banking techniques and procedures: *ibid.*, p.376-377

⁵²³ Nigerian opens some key-sectors for instance electricity and petroleum (<http://www.nigerianembassy-chile.org/business/xprivatisation.shtml>). In this matter, one of the most important question is the level the local equity must reach for the JV to be valid. It must be pointed out that the less this level is the less transfert of technology works and the less involved the investor is: those consequences being negative to the hosting country: J.W.Salacuse, *ICSID Rev. – FILJ*, 2000, Vol.15, N°2, p.390. A good example to follow would be Ethiopia which set the level of local to at least 27%: M.P.Porter, *ICSID Rev. – FILJ*, 1999, Vol.15, N°273

⁵²⁴ Sec.21(1), Nigerian Investment Promotion Commission of 1995 allows foreign ownership up to 100%

⁵²⁵ Some approvals are necessary to obtain incentives (Art.12, Ethiopian Investment Proclamation). In Nigeria, the “Industrial Policy of Nigeria” clarified that 4 approvals were required with more to obtain if investment is in a specific fields: C.Ubezou, *Some Recents Amendments to Laws affecting Foreign Investment in Nigeria*, *ICSID Rev. – FILJ*, 1993, Vol.8, N°1, p.126. In Angola, due to permits to obtain to establish a business, it requires almost 5 months: http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_NTE_Report/asset_upload_file_16_7450.pdf (p.5)

⁵²⁶ W.Salacuse, *ICSID Rev. – FILJ*, 2000, Vol.15, N°2, p.392

⁵²⁷ Currently TISA only provides advises and points investors where they need to get licenses but it cannot do everything for the investor. http://www.safrica.info/doing_business/investment/agencies/onestop.htm

⁵²⁸ Such an organisation was created in Nigeria, Malawi, Angola, Tanzania. It reduces time and costs to set up a business. Ubezou, *ICSID Rev. – FILJ*, 1993, Vol.8, N°1, p.126: for the example of Nigeria.

⁵²⁹ Tax holidays for a period of time (Tanzania) or tax reduction if investments to improve infrastructures (Art.13, Mozambican Code of Fiscal Benefits for Investments). For the general tax regime, it seems better to have a moderate tax rate with few exemptions rather than a high tax rate with numerous exemptions

⁵³⁰ Foreign Investments in China boomed when the country decided to change their foreign exchange system: W.Salacuse, *ICSID Rev. – FILJ*, 2000, Vol.15, N°2, p.392

⁵³¹ The best way is a long-term lease like in Tanzania (99 years) but the entity supposed to give the lease must show good will (in Ethiopia, region which have such a power are reluctant to give these leases according to the press: M.P.Porter, *ICSID Rev. – FILJ*, 1999, Vol.15, N°275. South Africa should give to TISA the power to grant leases

in case of expropriation⁵³². The second idea must be coupled with the adoption of the ICSID Convention⁵³³. Indeed, even if most of the Investment laws provide first the resolution of disputes by conciliation, the trend is to give powers to arbitrators in case of a dispute⁵³⁴. Though some exceptions persist, these three provisions are present in recent Investment Laws of the southern region⁵³⁵.



⁵³² Conditions for expropriation must be narrow (essentially based on “public interest”, notion which must be defined in the law) and the compensation must be fair, equitable and prompt: Sec.25(2) of the 1996 South African Constitution. However, the Constitution does not define “public interest”, mistake that must be corrected by an Investment Law.

⁵³³ The consent to arbitration by the State can be found either directly in the law (1988 investment law of the Central African Republic) or indirectly when the country issues a permit to invest (Namibian Foreign Investment Act of 1990)

⁵³⁴ Angola is in the region the only country which does not allow for international arbitration; Angolan courts still handle any investment dispute: available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_NTE_Report/asset_upload_file_16_7450.pdf (p.4). Angolan examples must not be followed.

⁵³⁵ Art.4, 13 & 25, Mozambican Investment Law of 1993 and Sec.3(2), 11 & 13, Namibian Foreign Investment Act of 1990

CONCLUSION

Created by the business community, Arbitration is the best way of solving disputes above the other Alternative Dispute Resolution mechanisms (Negotiation and Conciliation) thanks to its binding effect and above Litigation because of its flexibility, its speed of resolution and its effectiveness.

Almost every country understood the impact of this ADR in ensuring investors and merchants that their eventual dispute would be settled in a neutral and efficient way. In Africa, for instance, regulations on International Arbitration were passed in Egypt, Madagascar, Zimbabwe, Nigeria, Zimbabwe. It has been shown that due to a bad reputation (lack of judicial systems, of good governance), Africa is a good place to develop International Arbitration which provides for a mechanism known and trusted by investors.

South Africa, one of the wealthiest countries on the Continent, is peculiar in Africa because its judicial system works well and the political risks are low. Instead of using these tremendous advantages (National Courts and Litigation are essential in the arbitral process and must be seen as complementary), South Africa has not made any efforts so far towards International Arbitration⁵³⁶. The hardest thing to believe is that South Africa still attracts investors (due essentially to the size of its market and the natural resources) although a study proved that in terms of actions South Africa is a latecomer. South Africa should realize that countries are competing to attract investments and relying only on its “natural” advantages is not a well-thought through long-term policy.

Therefore, South Africa should enact an International Arbitration Act as soon as possible in three steps. First, by enacting the UNCITRAL Model Law, South Africa could demonstrate its willingness in repealing the old Arbitration Act of 1965 (domestic Arbitration would still be regulated by this Act) and give less powers to national courts and more to the parties or the arbitrators. Then, South Africa ought to sign the Washington Convention to develop a sensitive area: Arbitration with States (the success of the ICSID Centre is undeniable and

⁵³⁶ Unfortunately, Arbitration can only expand with the willingness of the States which have to pass regulations and sign Conventions. Besides, the key role of judges in developing Arbitration has already been seen. In fact, a “ménage a trois” between States, national judges and arbitrators is necessary to make Arbitration expand.

brought trust in Arbitration among Member States). Finally, the country should modify the law on recognition and enforcement of foreign arbitral awards in softening the regime.

In addition to an International Arbitration Act, the author proposes that South Africa takes two other actions for a better investment climate. While passing the International Arbitration Act, the country must create an Arbitration Centre responsible for the training of arbitrators, the supply of support services and the promotion, education and communication on Arbitration. Secondly, South Africa would be wise to pass an Investment Act for the development of Foreign Investments. Indeed, even though Arbitration plays a great role in attracting investors who will know in advance the way disputes are settled, it plays a small role compared to an Investment Law which will provide all the incentives granted to investors⁵³⁷. Here again, the modernisation of TISA into a real “one-stop” agency which will centralises all the services (permits and licenses, information on the country) needed by the investor is a priority. Finally, South Africa should sign BITs⁵³⁸ and Bilateral Tax treaties to complete the system.

Following all these requirements, South Africa will have all the chances to attract foreign investment. Moreover, considering the link between FDIs and development⁵³⁹, this country could use investments to tackle problems the South African society is facing (HIV/AIDS, Poverty).

⁵³⁷ Most of the recent Investment Laws provide Arbitration as the main mechanism to solve disputes.

⁵³⁸ following examples of China (99 BITs) or Egypt (57 BITs): for the website, see footnote 355

⁵³⁹ FDIs does not only mean money for the host country but also transfer of technology, introduction of new skills, increase of productive capacity, employment, new goods and services: W.Salacuse, ICSID Rev. – FILJ, 2000, Vol.15, N°2, p.383

BIBLIOGRAPHY

Books

- A.A.Asouzu, *International Commercial Arbitration and African States*, Cambridge University Press, 2001
- P. Chabal, *Democracy and Daily life in Black Africa*, London: Hurst, 1977
- E. Cotran & A. Amissah, *Arbitration in Africa*, The Hague: Kluwer Law, 1996
- Craig, Park & Paulsson, *International Chamber of Commerce of Arbitration*, ICC Publishing, 1990, 2nd ed.
- R. David, *L'Arbitrage dans le Commerce International* («Arbitration in International Business»), Economica, 1982
- P. Fouchard, *L'Arbitrage Commercial International* («International Commercial Arbitration»), 1965
- P.Fouchard, E.Gaillard, B.Goldman, *Traite de l'Arbitrage Commercial International*, (“International Commercial Arbitration Treaty”), Litec, 1996
- M. Fulton, *Commercial Alternative Dispute Resolution*, LBC, 1989
- I.L. Griffiths, *The African Inheritance*, London: Routledge, 1995
- M.Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes*, Martinus Nijhoff Dordrecht ed., 1993
- J-M Jacquet & P. Delebecque, *Droit du Commerce International* («International Business and Investment Law»), Dalloz Cours, 2002, 3rd ed
- Murray, Rau & Sherman, *Process of Dispute Resolution*, Westbury Foundation, 1996
- M. Palmer & S. Roberts, *Dispute Processes: ADR and the Primary Forms of Decision Making*, London Butterworths, 1998
- A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, 1999
- Webster's Unabridged Dictionary*, 3rd Edition, 1976
- D. Sutton and J. Gill, *Russel on Arbitration*, Sweet & Maxwell, 2003, 22nd ed
- A.J.Van den Berg, *The New York Arbitration Convention of 1958*, Kluwer Deventer, 1981

Articles

- A.A.Asouzu, *The Legal Framework for Commercial Arbitration and Conciliation in Nigeria*, ICSID Review-F.I.L.J., fall 1994, Vol.9, N°2
- A.A Asouzu, *The adoption of the UNCITRAL Model Law in Nigeria: Implications on the Recognition and Enforcement of Arbitral Awards*, Journal of Business Law, 1999
- A.A Asouzu, *the UN, The UNCITRAL Model Law and the Lex Arbitri of Nigeria*, Journal Of International Arbitration, 2000, Vol.17, N°5
- A.A. Agyemang, *African States and ICSID*, CILSA, 1988, Vol.21

- A.A. Agyemang, *African Courts, the Settlement of Investment Disputes and the Enforcement of Awards*, Journal of African Law, 1989, N°33
- P. Bernardini, *The Arbitration Clause of an International Contract*, Journal of International Arbitration, 1992, N°2
- M. Blessing, *La Procédure d'Arbitrage selon le Nouveau Règlement de la CCI - Analyse des Changements* ("The Arbitral Procedure under the New Arbitration Rules of the ICC – Analysis of the Changes"), Bulletin de la Cour Internationale d'Arbitrage de la CCI, December 1997
- K.-H. Böckstiegel, *Settlement of Disputes between Parties from Developing and Industrial Countries*, ICSID Rev. – FILJ, Fall 2000, Vol.15, N°2
- R.Boivin, *International Arbitration with Stares: an Overview of the Risks*, Journal of International Arbitration, 2002, Vol.19, N°4
- D.J. Branson, *Ethics for International Arbitrators*, Arbitration International, 1987, N°1
- A.Broches, *Bilateral Investment Treaties and Arbitration of Investment Disputes*, in Schultsz and Van den Berg, *The Art of Arbitration*, Kluwer, 1982
- A.Broches, *A Guide for Users of the ICSID Convention*, News from ICSID, 1991, N°1
- M.A.Buchanan, *Public Policy and International Commercial Arbitration*, American Business Law Journal, 1988, Vol.26
- D.W.Butler, *The State of International Commercial Arbitration In Southern Africa: Tangible yet Tantalizing Progress*, Journal of International Arbitration, 2004, Vol.21, N°2
- D.W.Butler & E.Finsen, *Southern Africa*, in *Arbitration in Africa*, Kluwer Law International, 1996
- J.P. Carver, *The Strengths and Weaknesses of International Arbitration Involving a State*, Arbitration International, 1985, N°2
- R.H. Christie, *South Africa as a venue for international commercial arbitration*, Arbitration International, 1993
- O. Chukwumerije, *Mandatory Rules of Law in International Commercial Arbitration*, Revue Africaine de Droit International Comparé, 1993, Vol.5
- R. Collins, *Alternative Dispute Resolution – Choosing the Best Settlement Option*, Australian Construction Law Newsletter, 1989, N°3
- Craig, *Uses and Abuses of Appeal from Awards*, Arbitration International, 1998, Vol.4, N°3
- F.G. de Cossio, *The International Centre for Settlement of Investment disputes – The Mexican Experience*, Journal of International Arbitration, 2002, Vol.19, N°3
- N. Dewan, *Interim Measures in Arbitration, A comparative Analysis of Indian and English Arbitration Acts*, International Business Law Journal, 2003, N°6
- R.H.Diwan, *Problems associated with the Enforcement of Arbitral Awards revisited Australian Consumer Protection; Conflict of Law; An English Law Perspective*, Arbitration International, 2003, Vol.19, N°1
- A.S.El-Koshery, *ICSID Arbitration and Developing countries*, ICSID Review – F.I.L.J., 1993, Vol.8, N°1
- P. Fouchard, *La Portée de l'Annulation de la sentence arbitrale dans son pays d'origine* («The Consequences of the setting aside of an award in the country of Origin»), Revue de l'Arbitrage, 1997, N°3
- P. Gibbon, *The World Bank and African Poverty*, Journal of Modern African Studies, 1992

- T. Giovannini, *Arbitrators and Arbitrators Institutions: Conflicts of Interest*, International Business Law Journal, 2002, N°6
- B. Goldman, *La Lex Mercatoria dans les contrats et l'arbitrage internationaux: réalités et perspectives*, (“*Lex Mercatoria* in International Contracts and Arbitration: reality and prospects”), Clunet, 1979
- J.L. Greenblatt & P. Griffin, *Towards the Harmonization of International Arbitration Rules: Comparative Analysis of the Rules of the ICC, AAA, LCIA, CIET*, Arbitration International, 2001, N°1
- F. Gurry, *The Dispute Resolution Services of the World Intellectual Property Organization*, Journal of International Economic Law, 1999
- B. Hanotiau, *The Applicable Law to the Issue of Arbitrability*, International Business Law Journal, 1998, N°7
- S. Jarvin, *The Place of Arbitration – A Review of the ICC Court’s guiding Principles and Practice when fixing the Place of Arbitration*, The ICC International Court of Arbitration Bulletin, December 1996
- Lord Justice Kerr, *Arbitration and the Courts: The UNCITRAL Model Law*, International and Comparative Law Quarterly, 1986
- R.H. Kreindler, *Transactions et Arbitrage dans le cadre du Règlement d’Arbitrage de la CCI*, (“Compromise and Arbitration in the frame of the Arbitration Rules of the ICC”), Bulletin de la Cour Internationale d’Arbitrage de la CCI, November 1998
- C.B.Lamm, *Jurisdiction of the International Centre for Settlement of Investment Disputes*, ICSID Review – F.I.L.J., 1991, Vol.6, N°2
- P.M.M.Lane, International Handbook on Commercial Arbitration, South Africa, Suppl. 20 (October/1995)
- O.Lando, *The Lex Mercatoria in International Commercial Arbitration*, International and Comparative Law Quarterly, 1985
- P.Leboulanger, *L’arbitrage et l’harmonisation du droit des affaires en Afrique* (“Arbitration and the harmonisation of business law in Africa”), Revue de l’Arbitrage, 1999, N°3
- J.-M. Loncle, *The Arbitration Option in Protection of Investment Treaties: Treaty Claims v. Contracts Claims*, IBLJ, 2005, N°1
- E.Loquin, *The Enforcement of International Arbitral Awards at the Beginning of the Third Millenium, Assessment and Survey*, IBLJ, 2003, N°7
- A.F.Lowenfeld, *Lex Mercatoria: An Arbitrator’s View*, Arbitration International, 1990, Vol.6, N°2
- Mann, *The Proper Law in the Conflict of Laws*, International and Comparative Law Quarterly, 1987
- A.L.Marriott, *Evidence in International Arbitration*, Arbitration International, 1989, N°3
- J.Morisset, *Foreign Direct Investment in Africa – Policies also matter*, Policy Research Working Paper 2481, The World Bank and the International Finance Corporation Foreign Investment Advisory Service, November 2000
- Lord Mustill, *The new Lex Mercatoria: the First Twenty-Five Years*, Arbitration International, 1988
- A.P.Mutharika, *Creating an Attractive Investment Climate in the COMESA Region*, ICSID Rev – FILJ, 1997, Vol.12, N°2
- A.I. Okekeifere, *The Enforcement and Challenge of Foreign Arbitral Awards in Nigeria*, Journal of International Arbitration, 1997, Vol.14, N°3

- A. I. Okekeifere, *Commercial Arbitration as the most effective Dispute Resolution Method: Still a Fact or Now a Myth?*, Journal of International Arbitration, December 1998
- B. Oppetit, *Arbitrage, Mediation et Conciliation*, (“Arbitration, Mediation and Conciliation”), Revue de l’Arbitrage, 1984
- P.E.K Quashingah, *Reflections on the Judicial Process in Traditional Africa*, Nigerian Juridical Review, 1988-1990, N°4
- T. Oyekunle, International Handbook on Commercial Arbitration, Nigeria, Suppl. 26 (February/1998)
- W.W. Park, *Illusion and Reality in International Forum Selection*, Texas Journal of International Law, 1995
- W.W. Park, *Bridging the Gap in Forum Selection*, Transnational Law & Contemporary Problems, 1998, N°8
- Park, *The Lex Loci Arbitri and International Commercial arbitration*, International and Comparative Law Quarterly, 1983
- J. Paulsson, *Third World Participation in International Investment Arbitration*, ICSID Review-Foreign Investment Law Journal, 1987, N°2
- J. Paulsson, *La Lex Mercatoria dans l’Arbitrage CCI* («Lex Mercatoria in the ICC Arbitration”), Revue de l’Arbitrage, 1990, N°1
- J. Paulsson, *Accepting International Arbitration in fact - and not only in words*, in Arbitration in Africa, Kluwer Law International, 1996
- C.M. Peter, *Promotion and Protection of Foreign Investments in Tanzania: a New Investment Code*, ICSID Rev. – FILJ, 1991, Vol.6, N°1
- M. Philippe-Gazon, *Role of the ICC International Court of Arbitration*, International Business Law Journal, N°4, 1997
- M.P.Porter, *The Ethiopian Investment Law*, ICSID Rev. – FILJ, 1999, Vol.15, N°2
- Prof. M.C. Pryles, International Handbook on Commercial Arbitration, Australia, Suppl. 26 (February/1998)
- Hon. A.Rogers, *Arbitrability*, Arbitration International, 1994, Vol.10, N°3
- E. Robine, *The Evolution of International Commercial Arbitration over these past years (1990-1995)*, Revue de Droit des affaires internationales, 1996, n°2
- J. Sachs, *Growth in Africa*, The Economist, 29 June 1996
- J.W.Salacuse, *Direct Foreign Investment and the law in Developing Countries*, ICSID Rev. – FILJ, 2000, Vol.15, N°2
- D. Samuels and N. Smith, *Inside Asia’s Courts*, International Commercial Litigation, April 1997
- P.Sanders, *Unity and Diversity in the Adoption of the Model Law*, Arbitration International, 1995, N°8
- S.P. Schatz, *The World Bank’s Fundamental Misconception in Africa*, Journal of Modern African Studies, 1996
- S.L. Sempasa, *Obstacles to International Commercial Arbitration in African Countries*, International and Comparative Law Quarterly, 1992
- I.F.I. Shihata, *Democracy and Development*, ICLQ, 1997
- Alessandra Sgubini, Mara Prieditis and Andrea Marighett, *Arbitration, Mediation and Conciliation: differences and similarities from an International and Italian business perspective*, Bridge Mediation, 2004

- M. Sornarajah, *The UNCITRAL Model Law: A Third World Viewpoint*, Journal of International Arbitration, 1989, Vol.6, N°4
- Y. Taniguchi, *The Changing Attitude to International Commercial Dispute Settlement in Asia and the Far East*, Arbitration and Dispute Resolution Law Journal, June 1997
- J.-M. Tchakoua, *The Status of the Arbitral Award by Consent: the limits of a useful ruse*, International Business Law Journal, 2002, N°7
- S.A. Tiewul & F.A. Tsegah, *Arbitration and the Settlement of Commercial Disputes: A Selective Survey of African Practice*, International and Comparative Law Quarterly, 1975
- L.Trakman, *Confidentiality in International Commercial Arbitration*, Arbitration International, 2000, Vol.18
- C.Ubezonu, *Some Recents Amendments to Laws affecting Foreign Investment in Nigeria*, ICSID Rev. – FILJ, 1993, Vol.8, N°1
- U.O. Umozuruike, *The African Charter on Human and People's Rights*, American Journal of International Law, 1983
- A.J. Van den Berg, *Non-domestic Arbitral Awards under the New York Convention*, Arbitration International, 1986, Vol.2, p.191
- S.A. Wako, *The Rule of Law: Corner stone of Economic Progress*, International Business Lawyer, 1995
- M. Wang, *Are Alternative Dispute Resolution Methods superior to Litigation in Resolving Disputes in International Commerce?*, Arbitration International, 2000, Vol.16, N°2

Case Law



- AAPL v. Democratic Socialist Republic of Sri Lanka*, ICSID Case N° ARB/87/3
- Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*, Decision of 6 July 1975, Year Book of Commercial Arbitration, 1979, Vol N°4, p.206
- Amco Asian v. Indonesia, Klöckner v. Cameroon*, ICSID N° ARB/81/2, Y.B. Com. Arb., 1985, p.71
- Atsa*, Court of Appeal of the State of New York (9th Circuit), 21 March 1983, 702 Fed. 2d
- CAA and CGE v. Argentina*, Decision of 21 November 2001 followed by *Ad hoc* committee, partial annulment of 3 July 2002, ICSID Review – F.I.L.J., 2001, p.659, §40
- Benidai Trading Co Ltd v. Gouws and Gouws (Pty) Ltd*, 1977 3 SA 1020 (T) 1038H
- Caribbean Trading and Fidelity Corp v. NNPC* US District Court, New York, International Arbitration Report, 1991, N°2, F-1
- *Chromalloy* , US District Court (District of Columbia), 31st July 1996
- Consorts Ury v. Galerie Lafayette*, Court of Appeal of Paris, 8 may 1970, Revue de l'arbitrage, 1970, p.80
- Dutco Construction Co. v. BKMI Industrieanlagen GmbH and Siemens AG*, Case N° 5836/MB of the ICC followed by Civ 1^{ère}, 7 January 1992
- Fassler, Kamstra and Holmes v. Stallion Group of Companies (Pty) Ltd.*, 1992 (3) SA 825 (W)
- Gosset*, Cass., 1^{ère} civ., 7 may 1963
- Heymans v. Darwins Ltd*, (1942) AC 357

- *Hilmarton* Cass. civ. 1^{re}, 23 March 1994, *Revue de l'Arbitrage*, 1994
- *Holiday Inns v. Morocco*, ICSID Case N° ARB/72/1
- *Klöckner v Cameroon*, ICSID N° ARB/81/2, *Y.B. Com. Arb.*, 1985, p.71
- *Labinal*, CA Paris, 19 may 1993
- *Lanco v. Argentina*, Decision of 8 December 1998, *ICSID Reports*, N°5, p367, §32
- *LETCO v. Liberia* ICSID N° ARB/83/2
- *Metalclad Corporation v. United States of Mexico*, ICSID Case N° ARB/AF/97/1
- *MINE v. Guinea*, ICSID N° ARB/84/4
- *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)
- *Mitsui de Mexico, S.A. de C.V. and Mitsui and Company Ltd. v. Alkon Textil, S.A. de C.V.*, 4th Chamber of the Higher Court of Appeals of the Federal District, 21 October 1986; reported in *Yearbook Commercial Arbitration XVI* (1991)
- *Murmansk* [1974] 1 A.L.R. Comm. 1
- *Navimpex* case, Cass., 1^{re} Civ., 6 december 1988, *Revue de l'Arbitrage*, 1989
- *Norsolor*, CCI N°3131, *Revue de l'Arbitrage*, 1993, p.525
- *Obeya v. A-G (Federation) and Anor*, 1987 3 Nigerian Weekly Law Reports (Pt 60) p.325
- *Parsons & Whittemore v. RATKA* (508 F.2d 969 (2D Cir. 1974))
- *Prima Point Co. v. Flood and Conklin Manufacturing Corp.*, 388 U.S. pp.395-403 (1967)
- *Renusagar Power Co. Ltd. v. General Electric Company*, *Yearbook of Commercial Arbitration*, 1995, Vol.20
- *Re Pinochet*, [1999] 2 WLR 272 at 283
- *Royal Exchange Assurance v. Benthworth Finance Nigeria Ltd* I.A.L.R. Comm. 72 T p.83-84
- *Salini Costruttori Spa & Italstrade Spa v. Morocco*, Decision of 23 July 2001, available in *International Legal Materials*, 2003, p.609, §52
- *SGS v. Philippines*, Decision of 29 January 2004
- *Singer*, AIR 1993 SC 998
- *SOABI v. Senegal* ICSID, ARB/82/1, *ICSID Rev. – FILJ*, 1991, p.119
- *SPP v. Arab Republic of Egypt* ,ICSID Case N° ARB/84/3
- *Tuesday Industries (Pty) Ltd v. Condor (Pty) Ltd*, 1978 (4) SA 379 (T) 383F-H
- *Van Herdeen v. Sentral Kunsmis Korporasie (Edms) Bpk*, 1973 (1) SA 17 (A) 26B
- *Wayland v. Everite Group Ltd*, 1993 (3) SA 946 (W)

Laws and Regulations

- Algerian legislative decree on arbitration of 1993
- Australian International Arbitration Act of 1989
- Bermuda's International Conciliation and Arbitration Act 1993
- Bulgarian International Commercial Arbitration Act of 1993
- Cameroon s' Code of Civil Procedure
- Cameroon's Law establishing the Oil Code of 1999
- Canada (Federal State)'s Commercial Arbitration Act 1986
- Central African Republic's investment law of 1988
- Egyptian Law on Arbitration in Civil and Commercial Matters of 1994
- English Arbitration Act 1996
- Ethiopian Investment Proclamation of 1996
- French Civil Code
- French Law on Arbitration, fourth book of the New Civil Procedure Code
- German Arbitration Law of 1998, tenth book of the Code of Civil Procedure
- Hong Kong's Arbitration Ordinance of 1997
- Indian Arbitration and Conciliation Act 26 of 1996
- Kenyan Arbitration Act 4 of 1995
- Madagascan Law on Arbitration of 1998
- Mexican Commercial Code
- Mozambican Investment Law of 1993
- Namibian Foreign Investment Act of 1990
- New Zealand Arbitration Act 99 of 1996
- Nigerian Arbitration and Conciliation Act of 1988
- Nigerian Investment Promotion Commission Act of 1995
- Ontario Arbitration Act of 1991
- Peruvian General Arbitration Law of 1992
- Quebec Civil Code and Code of Civil Procedure
- Scottish Law Reform (Miscellaneous Provisions) Act 1990
- Senegalese law establishing the Oil Code of 1998



- South African Arbitration Act of 1965
- South African Constitution of 1996
- South African Recognition and Enforcement of Foreign Arbitral Awards Act of 1977
- South African Protection of Business Act 99 of 1978
- Swiss Private International Law Act
- Tunisian Law on Arbitration of 1993
- Ugandan Arbitration and Conciliation Act of 2000
- Zambian Investment Act of 1993
- Zimbabwean Arbitration Act of 1996

International Conventions and Treaties

- The NY Convention available at <http://www.uncitral.org/english/texts/arbitration/NY-conv.htm>
- The Washington Convention available at <http://www.worldbank.org/icsid/basicdoc-archive/9.htm>
- Additional Facility*, available at <http://www.worldbank.org/icsid/facility/facility.htm>
- The UNCITRAL Model Law of 1985 available at <http://www.uncitral.org/english/texts/arbitration/ml-arb.htm>
- SADC Treaty



BITs (available at http://www.unctadxi.org/templates/DocSearch_779.aspx)

- Chile/South Africa BIT
- UK/South Africa BIT
- The Netherlands/South Africa BIT
- Turkey/South Africa BIT
- Republic of Korea/South Africa BIT
- Nigeria/UK BIT
- Sweden/Egypt BIT
- Cameroon/US BIT
- The Netherland/Venezuela BIT

Arbitration Rules

- 1998 Arbitration Rules the ICC
- Rules of the Common Court of Justice and Arbitration of the OHBLA (“OHADA”)

Publications

- AALCC, *Report on the Seventeenth, Eighteenth and Nineteenth Sessions held in Kuala Lumpur (1976), Baghdad (1977) and Doha (1978)*
- Analytical Compilation of Comments by Governments and International Organisations on the Draft Text of a Model Law on International Commercial Arbitration*, A/CN.9/263, 19 March 1985, §12-17
- *Arbitration: an International Arbitration Act for South Africa* South African Law Commission, 1998
- Fundamental Changes Taking Place in the World and their Implication for Africa*, OAU, Report of the Secretary-General to the 26th Ordinary Session of the Assembly of the Heads of State and Governments, 6 July 1990
- Guide to the Model Law*, Analytical Commentary, 25 March 1985 (U.N. DOC.A/CN.9/264).
- Guidelines for Conciliation and Mediation*, The Chartered Institute of Arbitrators, 1990 edn
- Intellectual Property*, Reading material of World Intellectual Property Organization, 1998, WIPO Publication
- The International Solution to International Business Disputes - ICC Arbitration*, ICC Publications, n°301, 1977,
- The Statistical Report of the ICC*, ICC International Court of Arbitration Bulletin, every year in the N°1
- UNCITRAL Secretariat, Explanatory Note on the Model Law on International Commercial Arbitration
- UNCTAD, *BITs in the 1990s*

Reports, Congresses and Speeches



- S. Bond, expert report in *Esso/BHP v. Plowman*, Arbitration International, 1995, N°8
- D.W. Butler, *Progress by South Africa towards Developing the Necessary Infrastructure for International Arbitration Involving Commercial and Investment Disputes*, Colloquium on International Commercial Arbitration and African States held in London in June 2003
- G. Hermann, *Conciliation as a New Method of Dispute Settlement* in Sanders (gen. Ed.), ICCA Congress Series n°1
- R. Higgins, *Pre-Conditions for Foreign Investment*, Energy Law (IBA), Topic 3, 1986
- A. Marriott QC, *Indian and International Arbitration*, address delivered on 6th May 2002 at New Delhi
- Report of Executive Directors on Convention on Settlement of Investment Disputes Between States and Nationals of Other States, 1965
- Q.Tannock, *Building the infrastructure for effective commercial dispute resolution in Southern Africa*, Colloquium on International Commercial Arbitration and African States held in London in June 2003
- J.D. Watkiss, *Considerations Affecting the Choice between Litigation, Arbitration or Mediation of Natural Gas Disputes*, paper presented at the International Conference on the Settlement of Energy, Petroleum and Gas Disputes, Cairo, Egypt, 18-19 November 1995

Web Sites

- <http://www.nigerianembassy-chile.org/business/xprivatisation.shtml>: overview of the Nigerian Promotion Investments Act

http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_NTE_Report/asset_upload_file_16_7450.pdf: overview of the Angolan Investment Act

-http://www.safrica.info/doing_business/investment/agencies/onestop.htm: overview of TISA

-www.arbitrators.co.za

-www.arbitration.co.za

-www.ccma.org.za/

