LCA

LAGOS COURT OF ARBITRATION

INTERNATIONAL CENTRE FOR ARBITRATION AND ADR

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FROM THE EDITOR

Mrs. Oluwaseun Oloruntimehin FCIArb

Editor

The Lagos Court of Arbitration brings to you this August 2020 Edition of its Newsletter which highlights recent global developments that impact alternative dispute resolution and its practice. Special thanks to Madame Marie-Andrée Ngwe, Mr. John Aku Ambi, Mrs. Amauche Chidozie and Ms. Nifemi Awe for their contribution to this Newsletter. We hope it provides you with useful information and you enjoy reading it as much as we enjoyed working together on it. We would love to hear your thoughts on the contents of this Edition and we welcome you to be a part of this knowledge exchange platform by submitting your articles to editor@lca.org.ng .

COVID-19 Update

As a result of the global pandemic, the annual training school along with other training and development activities were postponed. Going forward, all our trainings would be held virtually until things return to normal globally. The annual training school for International Arbitration Certificate Programs will hold virtually from 7-18 September 2020. Our heartfelt appreciation goes to our international faculty who are selfless in their commitment to the LCA and the development of their colleagues. Dates are being finalized for all other trainings.

Although the Secretariat staff is working remotely at the moment, the LCA remains steadfast in its commitment to being the preferred natural and neutral arbitral institution in Africa and will continue to provide impeccable services in accordance with best practices in domestic and international arbitration and ADR. The Secretariat is open to receive all submissions and enquiry online at info@lca.org.ng and omlewis@lca.org.ng

Thank You.

WELCOME ADDRESS BY THE

PRESIDENT

Dr. Adewale Olawoyin

On behalf of the Board of the Lagos Court of Arbitration (LCA), I am pleased to welcome you to this issue of the LCA Newsletter. While the world adjusts to the current global pandemic, we are learning to evolve our business and interactions to meet changing times.

This edition of the newsletter captures various trending topics and issues in ADR, in light of the evolution of the business of ADR to meet fast developing times during this COVID-19 pandemic and post-pandemic.

I thank all the esteemed members of the Court for their unending support and contribution. We are stronger because of you. In the coming months of the year, the LCA hopes to organize various trainings to help practitioners develop the requisite skills required to become a global ADR practitioner. We also hope to organize certain sector-specific ADR trainings which we will share with members of the Court, first and on our various social media platforms.

I hope that you have an insightful read as you go through this edition of the newsletter. We welcome your feedback on the contents of this newsletter and your opinion or suggestions for future editions of the newsletter.

Thank You.

EXECUTIVE SECRETARY

Ms. Oluwatosin Lewis

It is my pleasure to present this edition of the Members Quarterly Newsletter, which highlights the activities of the LCA in the last half of 2019 to the second half of 2020, alongside novel practices in the field of international arbitration. Some of our most notable highlights are:

-The LCA hosted the annual LCA-YAN International Arbitration Moot Competition from 25 – 26 July 2019.

- The LCA also held its first International ADR Summit from 16 – 20 September 2019. This one week long summit featured different tailored/industry-specific ADR masterclasses taught by seasoned practitioners across the globe.

- The LCA supported the maiden edition of the Arizona State University Space Governance Innovation Contest and in collaboration with the Arizona State University (Space Advisory Project) Interplanetary Initiative, held an exclusive Stakeholders Workshop on Emerging Areas of Law in ADR (Space, Sport & Entertainment Industries) on 17 February 2020.

The LCA hosted a virtual interactive discussion on the Draft Code of Conduct for Investors in Investor-State Dispute Settlement on 9 July 2020. This issue features an interview with a foremost international Arbitrator and also features the profile of a selected LCA member under the Member Focus segment. The member focus segment will continue to feature selected LCA members, alternating -between student members, individual members and corporate members.

There are two very interesting articles featured. There is an article on the Technical Notes on Online Dispute Resolution published by UNCITRAL and also an article on the ICSID and UNCITRAL Draft Code of Conduct for ISDS Adjudicators.

Don't forget to pop into the Global News and Upcoming Events sections for more topical global dispute resolution news and exciting and stimulating events in the near future.

INTERVIEW

With

Barrister Marie-Andrée Ngwe

Your career focus has been in ADR with a solid foundation in commercial and corporate legal advisory services. Please can you tell us more about your career trajectory and the defining moments in your career. What are some lessons you have learnt thus far and how have they been transformational?

I am a member of the Cameroon Bar Association since 1981. I worked as an associate in a major law firm for 10 years. In 1986, I founded my own law firm. I started with only one secretary. At the beginning, I was a general legal practitioner. I contributed in the Chad-Cameroon pipeline project as local counsel, and this was the starting point of intensive work advising investors and their lenders. In 2014, the year I specialised entirely in ADR, I already had a team of around thirty people including eleven lawyers. This decision was the result of a choice in my personal life. It was also the fruit of my conviction that ADR is an important factor for an appeased economic environment and the promotion of national and international investments. I should therefore be considered as an independent arbitrator and mediator because I no longer work as counsel.

Building a stable and motivated team entails having a friendly working environment and motivating wages. Having the right legal and administrative information is also essential in business. It is thus capital for a lawyer to set up a system to access information in order to quickly respond to clients' demands.

According to Chambers & Partners, you think outside the frame and your law firm has been distinguished for several years by Chambers Global, what would you say has been fundamental to this height of success?

The answer should come from the clients and fellow lawyers Global Chambers consulted to make their ranking. In my opinion, it may be because of our effective and constant implementation of the lessons mentioned in the previous answer. I can also add our strict application of tenets to avoid conflicts of interest, even potential ones. It sometimes implies declining certain cases. Finally, we propose solutions to clients' problem without limiting ourselves to erudite and theoretical statements. We must take a stance when clients ask questions.

Given your extensive experience in international arbitration, mediation and conciliation, what are some invaluable traits that are essential for the present-day ADR practitioner?

An ADR practitioner is supposed to be available, independent, impartial and competent in the type of ADR involved. These are standard qualities. They are essential for one to be recognized as a good ADR practitioner.

To be chosen, one should be reliable and known. In order to be known, you have to attend conferences, seminars, webinars, and write articles. To be trust-worthy, you must work as I mentioned in my previous answers.

The ICSID reform process has yielded the recent Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement (Code), what are your thoughts on the proposed amendments especially on the application of the Code, conflict of interest, disclosure requirements, double hatting and enforcement mechanism and how would they change the current landscape for arbitrators?

The Code of Conduct for Adjudicators in Investor- State Dispute Settlement is still a project. Several rules established by the project are already part of the rules of various arbitration institutions, and in the IBA Rules and the Prague Rules. There are some innovations too. The introduction of a binding code applicable to all ISDS (Investor-State Dispute Settlement) and comprising practical rules to promote transparency in the appointment of Adjudicators and to guarantee their independence and impartiality is a very positive sign.

The binding nature of the provisions of the Code on all arbitration actors (Adjudicators) in all ISDS will surely have as an indirect effect on the introduction of diversity (age – gender – origin) in the ADR market. Will African ADR practitioners benefit from this effect? Yes, but to a greater extent, it is not certain. The choice of an arbitrator or, in a broader sense, an adjudicator is based on trust and we know that there is still some bias. Moreover, it has emerged from several colloquiums that African States were reluctant to appoint African adjudicators.

Double hatting can have an adverse effect by reducing chances of African adjudicators to be appointed because, currently, only few of them are known in the area of ADR. Will opening the market to diversity benefit adjudicators from the continent? My personal opinion is that the provisions of the Code, which does not primarily seek to create diversity, will not necessarily mean a shift in favour of African practitioners. Thus, States will have to be committed to appoint more African adjudicators.

The ICSID reform process has also engineered extensive proposals and even more debate, in the light of these what would be the future outlook for Investment Treaty Arbitration and how can African ADR practitioners assume a principal role?

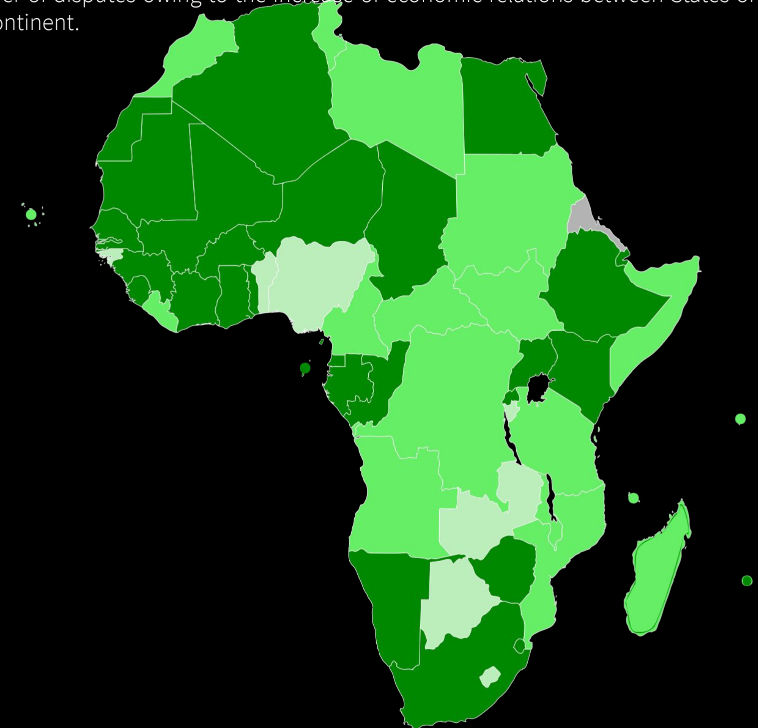
Africa's decisive contribution to the creation and development of the ICSID dispute resolution system is well known. Moreover, Africa's contribution to the widespread use of various ICSID proceedings and the development of its jurisprudence is sometimes underscored. Paradoxically, the contribution of African ADR practitioners to ICSID proceedings remains meagre.

The ongoing reform process will have a positive impact in reducing criticism in the ICSID Dispute resolution system as a whole. These reforms will undoubtedly contribute, though indirectly, to a greater participation of African ADR practitioners.

However, we should bear in mind that the appointment of counsels, arbitrators and conciliators mainly falls within the prerogatives of the parties that seek experience. It is therefore incumbent on African States to give a chance to African ADR practitioners to build their reputation by appointing them in proceedings. As such, after obtaining their first designation by African States, their talents would be unveiled and they could play a more important role in international proceedings and not only in African proceedings.

The proposed implementation date for the African Continental Free Trade Area (AfCFTA) Agreement is January 2021, how would this influence intra-Africa investment and the accompanying need for effective dispute resolution? Would this increase the opportunities for ADR practitioners within the region?

I think the African Continental Free Trade Area (AfCFTA) will lead to an increase in the number of disputes owing to the increase of economic relations between States on the continent.



This will spark competition between arbitration centres to attract that “client base”. Will regional arbitration centres be better off than domestic centres? The parties will base their choice on the reputation of the centres and their ability to offer the services relevant for these specific types of dispute.

The treaty contains innovative provisions for dispute resolution. The Dispute Settlement Body intervenes to provide mediation or, conciliation or good offices. They can also set up a specific mechanism called the Panel. Panel decisions may become binding on the parties.

It is stipulated that the Secretariat shall have an open list of professionals who have competence and experience in the resolution of disputes arising from international trade agreements. Practitioners will therefore need to battle to be on this list.

Are there additional insights from your experience, you would like to share with the ADR community?

The focus is on arbitration but I firmly believe in the promotion of other dispute resolution modes such as mediation, conciliation, facilitation, expertise, good offices, etc. In this sense, the provisions of the AfCFTA are ground-breaking. The practice of these dispute resolution modes requires more than legal skills. The ADR community must therefore be trained for that purpose. It may be interesting to think about well-designed and enforceable laws relating to economic activities applicable by all African companies (as the Uniform Acts for the OHADA zone or the Draft European Business Code). It may contribute to the success of AfCFTA by preventing conflicts of laws between economic stakeholders of the continent.

I thank the Lagos Court of Arbitration for choosing to interview me, and its editor for her questions. I am highly honoured to contribute to the Newsletter of this outstanding international arbitration institution.

Barrister Marie-Andrée Ngwe is a Cameroon Bar Association member. She is an ICSID conciliator, a certified mediator, an independent arbitrator, president of the CMAG’s Standing Committee (Centre de Médiation et d’Arbitrage du GICAM), AfDB Sanctions Appeals Board member, LCA Arbitration Committee member, and “Comité Français de l’Arbitrage” Working group on OHADA arbitration member. Before working exclusively in alternative dispute resolution, Marie-Andrée Ngwe practiced law for thirty years in the areas of litigation and investment law. She is recognized for her expertise and her involvement in the development of a business climate that is conducive for investment in the OHADA region.

ARTICLE

REGULATING THE ADJUDICATORS

An Analysis of the ICSID and UNCITRAL Draft Code of Conduct for ISDS Adjudicators.

By Mrs. Oluwaseun Oloruntimehin

Background

On 1 May 2020, the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL) jointly published the first *Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement* (Code).

The Code is an outcome of the wider reform initiatives for Investor-State Dispute Settlement (ISDS) which includes the ICSID's proposals to amend its rules of procedure and the reform solutions by the UNCITRAL Working Group III (WG III). Proposals for reform submitted by Member States in WG III were considered and the Code is based on a comparative review of the standards found in existing codes of conduct.

The proposed Code contains 12 articles, each of which is accompanied by useful commentaries on policy rationale and some of which include multiple proposals for further discussion. The Code seeks to address a range of ethical and contested issues such as pre- and post-appointment obligations of adjudicators, independence and impartiality, conflicts of interest, disclosure obligations, repeat appointments, double hatting, issue conflicts, availability of adjudicators, implementation and enforcement mechanisms.

This review draws attention to key provisions of the Code and their possible implications to the present status quo, albeit with an African bias. It also advocates some recommendations that are worth further consideration.

Broad Scope of application

The combined reading of *Article 1 and 2* signals that the Code will apply to a broad spectrum of existing and possible future participants of ISDS proceedings. The Code which applies to only 'adjudicators' in ISDS proceedings however expands the meaning of adjudicators to include arbitrators, members of international ad hoc, annulment or appeal committees and judges in permanent bodies for ISDS.

The application of the Code pre-dates appointment, as it is also applicable to proposed adjudicators for appointment (candidates) and extends to all levels of proceedings including first instance, annulment and potential appeal. It is also applicable in ad hoc or institutional proceedings whether akin to arbitration or to proceedings in a multilateral or bilateral standing body or mechanism.

The expanded scope of ISDS implies that obligations will apply regardless of the basis for the adjudication between an investor and the host State. State is also given a broad definition as it includes States, Regional Economic Integration Organizations (REIO), constituent subdivisions of a State and agencies of a State or REIO. Therefore, the Code could potentially implicate tribunals in international arbitrations, arbitrations under domestic laws or arbitration agreements between a foreign investor and a government, state subdivision, regional economic organization or any of their agencies.

Legal and research assistants of adjudicators are also not left out as they will be required to be aware of, and comply with, the Code even though the burden of ensuring this is placed on their supervisory adjudicator. However, the Code will not apply to counsel, experts and other participants including arbitral institutions, registries, secretariats or courts that routinely provide administrative, logistics, registrar functions and assistance. The obligations in the Code is also not designed to address the screening and nomination process for a candidate to be part of a standing body or mechanism but rather applicable when judges are selected to hear a specific case.

Principal Duties and Responsibilities

Article 3 prescribes core principles and duties of adjudicators which reflect fundamental ethical requirements, commonly found in codes of conduct. They include: (i) continued independence and impartiality, avoidance of conflicts, impropriety and bias; (ii) maintenance of the highest standards of integrity, fairness and competence (equal treatment, absence of *ex parte* contacts, non-delegation of decision-making function); (iii) availability, diligence, civility and efficiency; and (iv) continued compliance with confidentiality and non-disclosure obligations.

Article 4 details personal and financial interests that may influence the adjudicators' conduct or judgement and interfere or appear to interfere with the performance of their duties. While *Article* 7 reiterates that adjudicators must not engage in *ex parte* communications and must maintain integrity, fairness and competence, *Article* 9 codifies generally accepted rules of confidentiality for adjudicators.

Extensive Disclosure Obligations

Article 5 requires candidates and adjudicators to avoid direct or indirect conflicts of interest. As a key policy tool, it provides broad disclosure obligations for interests, relationships or matters that can reasonably be considered as affecting independence or impartiality. Such disclosures include any professional, business and other significant relationships with parties, their subsidiaries, parent-companies or agents, the parties' counsel, experts, other adjudicators, or third-party funders within the past five years and any financial interest in the proceedings or proceedings on the same issue.

A duty is also placed on (prospective) adjudicators to be pro-active, make all reasonable efforts to become aware of such pertinent interests, relationships or matters and make prompt disclosures as and when they arise. The guiding principle is that when in doubt, candidates and adjudicators must err in favour of disclosure and disclose extensively. However, adjudicators and candidates are not required to disclose interests, relationships or matters whose bearing on their role in the proceedings would be "trivial".

The decision on what to disclose may become difficult to decipher with great clarity and certainty as making a balance between the need to disclose "other significant relationships" and non-requirement for disclosure for "trivial" relationships is tricky. In Africa, there are several activities and ties that may be deemed to have created a relationship but in the real sense do not. The question then becomes when to draw a line between a significant relationship and a trivial one (acquaintance). Would membership in the same association(s) or attendance of the same events be deemed to have created a significant relationship or is it a trivial one? In this regard, more guidance and greater specificity for open-ended phrases like "other significant relationship" and "trivial relationship" would be welcomed.

The policy rationale of this continuing duty of disclosure is that these disclosure obligations ensure that parties have all the information necessary to make informed decisions as to the independence and impartiality of an adjudicator, before and during appointment.

It seeks to level the playing field by ensuring that all parties receive the same information and know as much as possible about candidates and adjudicators.

These provisions raise salient considerations and proposals for policy makers which includes, limiting disclosure to a certain number of years, extending disclosure obligations to relationships with subsidiaries, parent companies or agencies related to the parties, as well as any third party with a direct or indirect financial interest in the outcome of the case.

The disclosure obligations also extend to direct or indirect financial interest in administrative proceedings, domestic court proceedings or another panel or committee proceedings that involves the same issues/questions that may be decided in the ISDS proceedings. This becomes particularly relevant for law chambers where lawyers share financial revenues (profit). This article posits that in such instances there should be an opportunity for ring fencing (as used in confidentiality considerations). This implies that if adjudicators are not directly involved in, or have knowledge of the facts or issues in, the other proceedings their financial interest in its outcomes should not carry substantial weight (against their independence or impartiality).

Repeat Appointments

In a bid to address concerns with repeat appointments and equip parties with necessary information, the Code requires extensive disclosure of appointments in *Article 5. Article 5 (2)(c)* requires candidates and adjudicators to disclose all past and present participation in ISDS and other international proceedings or related domestic arbitrations whether as a counsel, adjudicator, expert or other function and whether with regards to the same issues, parties or participants.

The concerns raised by repeat appointments is based on the presumption that an adjudicator who is repeatedly appointed by the same counsel, client, party or 'side' (Claimant or Respondent) may develop a dependence or affinity with the nominating /appointing party or become biased in its favor.
Issue Conflicts

As bias may be unconscious, this concern is difficult to address and completely assuaged. The policy solution is to provide parties with relevant information that will enable them to assess meaningfully on a case-by-case basis, the relationship between adjudicators and each party or participant in the proceedings and evaluate possible conflicts of interest. Additionally, repeat appointments include not only adjudicators and parties, but can also include experts, mediators, conciliators and any other role that may create financial dependence or may involve the same set of facts, issues or parties. While a complete ban could risk the creation of unnecessary constraints on the pool of adjudicators available to the parties, the prevalence of repeat appointments is also seen as a barrier to entry for new or more diverse adjudicators. Proposals that balance these opposing concerns may be worth exploring.

Issue Conflicts

Concerns on issue conflicts are sought to be addressed by the requirement for disclosure of all publications and possibly relevant public speeches in *Article 5(2)(d)*. The argument on issue conflicts is premised on the presumption that if an adjudicator has taken a position on a legal matter relevant to the case in a publication or speech, the adjudicator is most likely to be biased or prejudge proceedings on the same issues.

This presents a difficult balance especially as adjudicators are expected to be experts and expertise is usually demonstrated by publications and public presentations or speeches. The policy rationale for this extensive disclosure is to provide parties with specific knowledge that will enhance understanding of the adjudicator's work and help identify bias or pre-judgement of relevant issues. However, one might question the value of such disclosure, as challenges based on issue conflicts rarely prevail in practice. This article proposes that the relevance of this connection between issue conflicts and prior publications only comes to the fore when predicated on the same set of issues and facts.

Double Hatting

Another highly criticized issue addressed by the draft Code is double hatting. This complex concept (double hatting) which is the subject of many debates, refers to a practice whereby an adjudicator simultaneously assumes multiple roles (overlapping roles) and acts as counsel, expert, adjudicator, mediator or in other relevant roles in separate ISDS proceedings.

Article 6 of the draft Code proposes alternate solutions which includes an outright ban of double hatting (recusal) or broad disclosure requirements of simultaneous, inconsistent or overlapping roles within a certain period of time. It is argued that a strict prohibition on double hatting can affect party autonomy and restrict entry of new entrants or adjudicators that bring gender and regional diversity. A possible reason is that newly nominated adjudicators would often be unable to forego other sources of income (such as counsel work) after their first nomination and until they become established. In the context of Africa where diversity and aggregate of practicing ISDS adjudicators and cases are still in early stages of development, a flexible long-time phased approach with disclosure obligations should be preferred.

Article 6 also provides diverse possibilities for defining the types of matters and overlapping roles that may lead to double hatting, this includes matters involving the same parties, facts or treaty, overlapping counsel and adjudicator work or overlapping counsel and expert or mediator work. Policy makers must pay close attention to these provisions and tailor appropriately to the development levels of Member States as the potential implications of these provisions are far reaching.

For contested issues like repeat appointments and double hatting, finding the right balance between ethical priorities, concerns over unconscious bias and appearance of bias, interest in enhancing diversity, and freedom of the parties to select an adjudicator will require in-depth discussions.

Availability and diligence

Article 8 requires candidates and adjudicators to ensure their availability to hear the case, render all decisions in a timely manner and refuse competing obligations. To achieve this, a limitation to the number of pending ISDS cases an adjudicator may have in a given period is proposed. However, this proposal is acknowledged to be controversial as the number of cases an adjudicator can diligently manage depends on a number of factors, including the complexity of the case, capacity of the individual and whether a case settles or becomes dormant.

Pre-appointment interviews

Pre-appointment interviews of potential arbitrators is a common practice in Africa and its appropriateness or otherwise is often debated. The nominating party or counsel would typically have done extensive research on the experience and track record of the proposed arbitrator. On the premise of this practice, *Article 10* provides that pre-appointment interviews should be limited to discussions concerning availability and conflicts of interest. Discussions of issues pertaining to jurisdictional, procedural or substantive matters potentially arising in the proceeding is prohibited. In a bid to promote transparency and preclude the exchange of inappropriate information with a candidate, pre-appointment interview records are required to be disclosed to parties upon appointment.

Adjudicator Fees and Expenses

Article 11 provides that any discussion relating to adjudicator's fees must be concluded immediately upon constitution of the adjudicatory body and, where possible, must be communicated to the parties through the administering entity. This facilitates early discussion of fees and enables parties to replace adjudicators early if they cannot agree with the rate requested. It also aims to avoid any situation where adjudicators accept an appointment and request different fees once the tribunal is formed.

Article 11 further provides that adjudicators must keep an accurate and documented record of the time devoted to the procedure and their expenses, as well as the time and expenses of their assistant.

Implementation and Enforcement Mechanisms

The Code notes that the tools available for enforcement will depend largely on how the Code will be implemented. Mechanisms for implementation noted in the commentary include incorporating the Code into investment treaties, disputing parties agreeing to the application of the Code, appending the Code to the disclosure declaration that adjudicators must file on acceptance of nomination, incorporating the Code into applicable procedural rules, or making the Code part of a multilateral instrument on ISDS reform. It seems difficult to understand the desire for binding rules when soft law instruments such as the IBA Guidelines on Conflicts of Interest are regularly and effectively applied in the ISDS proceedings, while leaving sufficient scope for case-by-case exceptions.

However, the rationale for binding rules may become tenable on the basis of the need for widespread adoption and adherence especially due to longstanding criticisms levelled against ISDS adjudicators. The Code recognizes voluntary compliance as a primary method of enforcement. Therefore, in *Article 12*, candidates and adjudicators are reminded of their duty to comply with the Code. *Article 12* also acknowledges that the pre-existing framework related to disqualification and removal procedures under applicable arbitral rules shall continue to apply. This could allow alleged violations of the Code to be raised in the context of existing challenge and removal procedures. Some WG III Member States have proposed additional sanctions for violation which includes monetary sanctions, disciplinary measures, reputational sanctions and notifications to professional associations. However, implementation difficulties of each of these sanctions have been identified, as such, none have been incorporated into the draft Code.

Conclusion

The Code has been drafted in a flexible way with several policy options for discussion. The ICSID and UNCITRAL Secretariats welcome comments on the draft Code until 15 October 2020 and the WG III will go on to consider the proposals. This draft Code is surely an important step towards better regulation of adjudicators as it seeks to include and address major issues and concerns raised by WG III and other stakeholders. However, only time will tell whether WG III Member States will agree on acceptable and uniform ethical standards necessary to strengthen and support ISDS proceedings. There may well be differing views from WG III Member States on some proposals including the extensive disclosure obligations, repeat appointments, limitations on double-hatting and caseload limits as well as the appropriate implementation and enforcement mechanisms. It will be interesting to see which options are ultimately selected by WG III for inclusion in the final Code. The next WG III Meeting, is scheduled to take place in October 2020, and should discuss recommendations of stakeholders including the comments to be sent by the Lagos Court of Arbitration.

Mrs Oluwaseun Oloruntimehin FCIArb – Managing Partner, S. O. Oloruntimehin & Co.

A multiple award-winning member of the Nigerian and New York bars, arbitrator (fellow), chartered secretary and administrator qualified in Nigeria and United Kingdom (UK), Mrs. Oluwaseun T. Oloruntimehin is the Managing Partner of S. O. Oloruntimehin & Co. Having worked in several leading law firms, she founded S. O. Oloruntimehin & Co. and over the years, she and her team have grown the firm to a full-service law firm with experience in dispute resolution, especially ADR and commercial transactions. She is a member of the Nigerian Bar Association, American Bar Association, fellow of the Chartered Institute of Arbitrators (UK), Lagos Court of Arbitration, Institute of Chartered Secretaries and Administrators, The Governance Institute (UK) and British Future Leaders Connect. She is known for using innovative ideas and legal concepts as well as technology tools in solving complex disputes and transactions.

DISPUTE RESOLUTION IN THE ERA OF COVID-19

UNCITRAL Technical Notes on Online Dispute Resolution in Perspective

By John Aku Ambi MCIArb

Introduction

The novel corona virus dubbed COVID-19, precipitated the gradual shut down of the global economy, socio-economic and political activities were grinded to a halt. The unfortunate results have been considerable loss of lives, with millions of job cuts, increasing poverty levels and significant disruption to our lives. Dispute resolution has equally not been insulated from this disruption.

Decades ago the advent of the Internet brought about the emergence of online dispute resolution (ODR). This era of COVID-19 has now brought renewed focus on its significance as a viable and indispensable mechanism in the sphere of dispute resolution. Prior to the COVID-19 pandemic, the global clamour for institutionalization of ODR resulted in the creation of diverse guidelines and platforms for ODR. In 2017 the United Nations Commission on International Trade Law (UNCITRAL) took a decisive step by publishing the Technical Notes on Online Dispute Resolution (Notes) which aims to serve as a corpus of guidelines to users of ODR platforms. Due to restrictions to movement and social distance guidelines imposed by the COVID-19 pandemic, the relevance of the Notes has been elevated as the need for dispute resolution mechanisms that do not require in-person proceedings have become more crucial. This article seeks to conduct a high level review of the Notes.

Online Dispute Resolution at a glance

The concept of ODR is open to two interpretations. The first is that it can be viewed from the prism that it is the resolution of any dispute through adjudication,

mediation or arbitration, which arose from a contractual relationship or transaction entered into online. For instance the resolution of a dispute between an online vendor of a smart-phone found to be defective by a buyer, contrary to the advertised conditions of the phone on the vendor's website. The second interpretation is to the effect that ODR involves the deployment of applications and computer networks to resolve all disputes. The second interpretation represents the globally accepted view of what ODR is.

It therefore suffices to say that ODR represents a different mechanism of dispute resolution whose platforms exist only in the cyberspace and only utilize networks of computers and tailor made software and programmes for dispute settlement without any physical contact. In contrast with Alternative Dispute Resolution (ADR) which is the resolution of disputes through means other than court adjudication or litigation, ODR could encompass court adjudication. Consequently, court adjudication online, online mediation, online arbitration, online negotiation and a host of other dispute resolution channels form the corpus of ODR.

Like there are different institutions which administer ADR services for instance the International Chambers of Commerce (ICC), the London Court of International Arbitration (LCIA), the Lagos Court of Arbitration (LCA), Permanent Court of Arbitration (PCA) etc; there are also platforms in the cyberspace which serve as the go-to ODR service administrators. *Arbitranet, Arbitrate online, Asian Domain Dispute Resolution Centre, Internet Dispute Resolution Centre, Conflict Resolution.com; Arbitration Center for Internet Disputes, EU Online Dispute Resolution*; these are a few out of the several ODR platforms which exist.[5] Interestingly, some established ADR service providers like the Lagos Court of Arbitration,Chartered Institute of Arbitrators and the American Arbitration Association also provide some ODR services. The enumerated ODR platforms like ADR service providers also have rules and guidelines to which disputants or parties are obligated to comply with.

The UNCITRAL Technical Notes on Online Dispute Resolution

ODR undeniably provides for an easy, fast, flexible and secured means of resolving disputes without recourse to physical contact. Having recognised this inherent advantage of ODR and in order to encourage timely resolution of cross-border commercial disputes, UNCITRAL published the Technical Notes. The Notes, which consists of twelve sections, is a non-binding document that provides comprehensive guidelines to prospective ODR users and stakeholders.

Section I (1)-(6) gives a general overview of what an online dispute resolution system entails and states the rationale which spurred the publication of the Notes. ODR is consequently described as encompassing a broad range of approaches and forms, including but not limited to ombudsmen, complaints boards, negotiation, conciliation, mediation, facilitated settlement, arbitration and others.

Guiding Principles

The underpinning principles of any adjudicatory system should be fairness, transparency, due process and accountability. *Section II (7)* recommends the adoption and practice of these *sine qua non* principlesto ODR administering platforms. *Section II (10)-(12)* deals with transparency principles and recommends that ODR administrators should disclose any relationship they have with a particular vendor so that users of the platform may be aware of any potential conflicts of interest. ODR platforms are also enjoined to keep statistics and outcomes of proceedings confidential, while also making available relevant information on their websites.

ODR platforms are encouraged in *Section II (13)-(14)* to have a code of ethics for neutrals on their conduct, while policies on identifying and handling issues relating to conflicts of interest should equally be adopted. ODR administrators are further encouraged in *Section II (15)-(16)* to adopt comprehensive policies on the selection and training of neutrals, consequently the existence of an internal quality assurance process would ensure that neutrals meet the platform's set criteria. Wrapping up this, *Section II (17)*, recommends that processes adopted in settling disputes of parties by platform administrators have the explicit and informed consent of parties.

Stages of an ODR proceeding

The Notes in *Section III (18)-(21)* provide the different stages in an ODR proceeding to include; negotiation, facilitated settlement and final stage. The processes as outlined are to be sequential in the order enumerated above. The negotiation stage, which is the first, should involve the claimant and respondent negotiating directly with one another through the ODR platform. If the negotiation fails, then a neutral should be appointed to facilitate settlement. Where the facilitated settlement fails, the ODR administrator or neutral may inform the parties of the nature of the third or final stage.

Scope of ODR process

Noting the cumbersome nature of traditional judicial mechanism for dispute resolution, the UNCITRAL suggests in Section IV (22)-(23) that ODR may be particularly useful and best suited for disputes arising out of cross-border, low-value e-commerce transactions. Consequently, an ODR process may apply to disputes arising out of both a business-to business as well as business-to-consumer transactions and to disputes arising out of both sales and service contracts.[13]

ODR definitions, roles and responsibilities, and communications

Section V (24)-(32) explicitly outlines the roles and responsibilities of each player in the system, terminologies used are also explained, while the channels and processes of communication by the players on the platform are also outlined.[14] It is instructive to note Section V (27) which defines an ODR administrator as the entity that carries out such administration and coordination [15] but states that an ODR administrator may be separate from or form part of the ODR platform. To this end it is imperative that both the ODR administrator and platform be specifically mentioned in the dispute resolution clause.[16]

Commencement of ODR Proceedings

Similar to any adjudicatory system, an ODR platform is required to have laid down procedures and steps whose ultimate outcome is the resolution of the dispute. Section VI (33)-(36) consequently suggests that an ODR platform's processes should provide for issuance of a notice of a dispute, service of claims and response to claims, the grounds of claims and the nature and form of documents to be filed and evidence to relied be on.

Negotiation

As previously stated, Section III (18)-(21) is suggestive of negotiation as the likely first stage of an ODR process. Section VII (37)-(39) however goes further to give a detailed description of what a negotiation phase in the ODR process ought to entail. It provides that being the first stage, a notice of the commencement of the process should be communicated to the parties and where the respondent fails to respond after the lapse of reasonable time, negotiation would be deemed to have failed.

Facilitated Settlement and Final Stage

Facilitated Settlement is provided for in detail by Section VIII (40)-(44).Upon the failure of negotiation, an ODR administrator is expected to appoint a neutral who would facilitate a settlement between the parties to a dispute. The ODR platform is expected to provide sufficient details about the prospective neutral, in order for parties to decide whether to appoint or reject such a neutral. A neutral upon being appointed is under an obligation to communicate with the parties and midwife the process of settlement. Failure of the neutral to settle the parties' dispute should necessitate the ODR administrator to initiate the final step.

It is provided in *Section IX (45)*, that the ODR administrator should consequently inform the parties which further step it intends to take to resolve their dispute. It could be safely inferred that the Notes recommend an ODR administrator to refer parties to other forms of dispute resolution; arbitration, mediation, expert evaluation as it deems appropriate.[21]

Appointment, powers and functions of the neutral

The process for appointment, powers, functions and obligations of a neutral for an ODR proceeding provided in *Section X (46)-(49)* is subject to the same due process standards applicable in an offline context. *Section X (50)* recommends that it may be desirable to use streamlined appointment and challenge procedures in order to address the need for ODR to provide a simple, time and cost-effective alternative to traditional approaches to dispute resolution. Thus neutrals are invariably expected to be independent and impartial, possess requisite skills and experience etc. A stand-out provision is *Section X (48) (e)* which recommends a single neutral at any given time.

Language

Leveraging the flexibility inherent in ODR, *Section X (51)* recommends that parties to a dispute should be at liberty to choose the language which accommodates their interest. ODR administrators are thus advised to instruct parties at the point of filing their notice for dispute resolution or at the point of filing response to claims and counter-claim, to indicate their language preference.

Governance

Section X (52)-(53) essentially reiterates the importance of an ODR process having a framework, which encapsulate principles, processes and procedures applicable or obtainable in offline dispute resolution proceedings and includes confidentiality, independence, neutrality and impartiality. It is therefore safe to say that this embodies the essence of UNCITRAL's effort in the area of promoting ODR.

Conclusion

The prevalence of COVID-19 has necessitated a tectonic shift in the way human beings interact with each other. Physical contact, which is an integral and almost indispensable part of mankind's social interaction habits, has become restricted and inadvisable. Discouraging physical contact has arisen from its discovery as a major means through which COVID-19 silently spreads. Invariably, any form of dispute resolution engagement undertaken offline involves physical interaction to a great extent or to a lesser degree. With the danger inherent in physical interaction, there is no better time to vigorously encourage ODR than now. ODR's qualities of flexibility, safety and cost-effectiveness would no doubt come in handy in these perilous times. UNCITRAL Technical Notes should therefore serve as an important, if not, indispensable guidebook to arbitral institutions, national judicial authorities and transnational adjudicatory bodies seeking to tow the path of ODR in this era of Covid-19.

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  The focus of the firm is on Human Capital Development offering diverse talent management solutions to organizations, individuals, institutions and youth it serves. A pragmatic and perceptive personality, she is an ardent believer in the ingenuity of the human person and what it can produce. Her philosophy is that "Everyone regardless of age, background and orientation has the capacity to transcend challenges by pitching their tent in continuous learning, unlearning, relearning and changing self to live and leave a legacy.
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- Specialized Certificate in Career Advisory at University of California San Diego (USA) – School of Extended Studies and Public Programs (2016 – 2017)
- Analytics Talent Manager (ATM), Human Resources Management and Services at Human Capital Institute – 2016
- Strategic Workforce Planning, Human Resources Management/Personnel Administration, General at Human Capital Institute (HCI) – 2016
- Psychometric Testing at Psytech International – 2016
- Msc, Management at Cranfield University – Cranfield School of Management, United Kingdom- (2012 – 2014)
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When her professional life is not in line, she loves to play tennis, badminton, enjoys reading, watching football, movies, travelling, dancing and spending quality time with friends and family. Amauche is happily married with three enchanting children.

Global News

LCA Webinar on the UNCITRAL and ICSID Draft Code of Conduct for ISDS Adjudicators

The Lagos Court of Arbitration (LCA) held an interactive virtual webinar to discuss the Draft Code of Conduct for Investor-State Dispute Settlement (ISDS) Adjudicators (Code). The virtual "roundtable" had a short plenary which comprised of presentations from three panelists followed by a highly interactive discussion with participants from Nigeria, Senegal, Kenya and Zambia.

Dr. Bayo Adaralegbe's presentation was on the evolution of the dichotomy and subsequent intercept between public international law and domestic legal system within the context of Investor-State arbitration while Prof. Paul Idornigie SAN, gave an overview on the policy rationale and role of Bilateral Investment Treaties (BITs). Mrs. Funke Adekoya, SAN then shed light on the procedures and practices of investor-state treaty arbitration especially in the context of the ICSID.

The interactive session with participants discussed salient provisions of the draft Code. While some participants called for some limitations as to relationships that may be considered as affecting independence and impartiality, others reiterated that extensive disclosure is preferable and a perception of dependence or bias should be avoided. It was added that extensive disclosure was to give parties full knowledge of the adjudicator and should not be seen as an automatic indication of conflict. It was however proposed that disclosure should be premised on relevance with the substantive issues. The proposed limitation on multiple roles was also debated with most participants of the view that it was not ripe for implementation in emerging economies like Africa with a small, yet growing, pool of arbitration practitioners. Other participants however argued that the profession was growing even in Africa and counsel and adjudicators should start defining their roles and prevent double hatting. The mechanism for enforcement of the draft Code was also discussed with some suggesting binding rules and incorporation in each country's professional/bar associations with sanctions for violation while others strongly suggested soft law and self-regulation akin to the International Bar Association Rules. The LCA would be collating all the views to be forwarded to the UNCITRAL Working Group III.

Trading Date under AfCFTA postponed to 1 January 2021

The African Continental Free Trade Agreement (AfCFTA) which was adopted on 21 March 2018 in Kigali Rwanda, entered into force on 30 May 2019 with a successful launch on 7 July 2019 in Niamey Niger. The AfCFTA is currently signed by 54 of the 55 African Union States (except Eritrea) and ratified by 30. Trading under the AfCFTA was due to commence on 1 July 2020, but as a result of the global COVID-19 pandemic, this date has been tentatively postponed to 1 January 2021. The AfCFTA promises to increase intra-Africa trade and investment and this may implicate an attendant demand for dispute resolution. Therefore, the AfCFTA Protocol on Settlement of Disputes akin to ADR mechanisms and including a mechanism similar to the World Trade Organization's dispute settlement body should assume a critical role in the near future. This should invariably promote the use and benefits of ADR mechanisms regionally.

Global News

Virtual Hearing Protocols

The global COVID-19 pandemic has brought a renewed focus on the role of technology in arbitration proceedings. The pandemic has necessitated the encouragement by arbitral institutions and tribunals for parties to maintain hearing dates through the use of virtual hearings in lieu of in-person evidentiary hearings. Virtual hearing protocols such as the Africa Arbitration Academy Protocol on Virtual Hearings in Africa (Protocol) have rendered invaluable guidance. This Protocol helps participants navigate thorny issues predicated on preliminary considerations, logistics and pre-hearing virtual consent; virtual hearings, presentation of evidence and fair hearing; security and privacy considerations; hearing protocol, infrastructure and technical standards. In addition, it provides useful templates for minimum cyber security standards, pre-virtual hearing agreement, virtual hearing clause, tribunal-issued cyber protocol and witness oath. Other notable virtual hearing guidance notes include:

CIArb	Guidance Note on Remote Dispute Resolution Proceedings
AAA-ICDR	Virtual Hearing Guide for Arbitrators and Parties
ICSID	The Art and Science of a Virtual Hearing
ICC	Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic.

Tanzania Arbitration Act 2020

The Tanzanian Parliament has enacted the new Arbitration Act 2020 (Act) which was given Presidential assent and passed into law on 21 February 2020 to replace the Arbitration Act 1931. The Act is broadly modelled to the English Arbitration Act 1996. The Act establishes the Tanzania Arbitration Centre responsible for the conduct and management of arbitration as well as accreditation of arbitrators in Tanzania. The Act is applicable where the seat of arbitration is Tanzania. The Act provides a dichotomy between domestic arbitration and international arbitration and recourse of appeal to the High Court. Importantly, the Act provides for recognition and enforcement of awards. Grounds for refusal to enforce awards akin to grounds under the New York Convention are provided but include grounds on fraud, bribery, corruption and undue influence.

Landmark Canadian Case on Unconscionability of Standard Form Contracts

Uber Technologies Inc. v. Heller (2020 SCC 16)

A majority of the Canadian Supreme Court on 26 June 2020 ruled that the mandatory arbitration clause, in Uber's standard form driver contracts, which requires disputes to be resolved through mediation and arbitration in Amsterdam, Netherlands was unconscionable and therefore invalid. The two elements of unconscionability, inequality of bargaining power and an improvident bargain, were found to be present in this case. It was found that the driver's earnings were less than $30,000 per annum, the driver had much less superiority to the corporation, and consequently, he was powerless to negotiate or even understand the terms of the contract which was silent on the arbitration costs.

Global News

Justice Brown, concurred with the decision of the majority but premised his agreement on a differing rationale that the imposition of exorbitant arbitration costs denied the driver access to justice, as such, the clause was contrary to public policy. Justice Côté *dissenting,* stated that the court should uphold the decision of parties to submit their disputes to arbitration and the majority's opinion offended the rule of systemic referral to arbitration in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801. Côté J based his rationale on the doctrines of competence-competence and separability of arbitration agreements. He added that the clause was neither unconscionable or contrary to public policy and even if it was the doctrine of severance should be applied to strike out the selection of arbitration and mediation under ICC Rules, which imposes substantial up-front arbitration costs ($14,500 plus legal and travel costs). He opined that a conditional stay of proceedings on the condition that the corporation advances the ICC filing fees should have been granted. By this majority decision, the Supreme Court has expanded the concept of unconscionability to standard form contracts and has permitted a proposed $400 million class action lawsuit against Uber to proceed.

Annulment of Arbitral Award by Egyptian Court on Public Policy Violation
Al-Kharafi v Libya (Judgment No. 39 of 130 JY, 3 June 2020)

On 3 June 2020, the Court of Appeal in Cairo, Egypt ruled that it could review an arbitral award for fundamental errors of law that amount to violation of public policy or equity and justice notions. This ruling was against an arbitration award issued in 2013 pursuant to an ad hoc arbitration in Cairo under the Unified Treaty for the Investment of Arab Capital in the Arab States (United Treaty). The arbitral award ordered that the State of Libya was responsible for breaches of contract, national law and the Unified Treaty. Contrary to the United Treaty's Annex which provides that arbitral awards pursuant to the Treaty are final and not subject to appeal, the arbitration award was annulled by the Egyptian court on the third annulment attempt. Jurisdiction for the annulment proceedings stems from the exceptions under the Egyptian arbitration law which permits the review of arbitral awards (decision on the merits of the case) on limited grounds which include violations of public policy rules. The Court of Appeal found that the compensation awarded (US$900 million) was disproportionate to the damage incurred (US$5 million investment) as a consequence of the claimed breach of obligations and it was unfair, excessively unjust and clearly unsupported by the record of evidence. The Court held that the tribunal had grossly and egregiously misinterpreted and misapplied the law, amounting to a failure to observe rules of public policy and the well-established notions of equity and justice.

UPCOMING ADR EVENTS

S/N	EVENT	DATE	WEBSITE	SUMMARY
1	CIArb (Nigeria) Tribunal Secretaries Training (Online Course)	11 August 2020	https://www.ciarbnigeria.org	An online course to equip arbitration practitioners with adequate knowledge and skills to required to sit as a tribunal secretary.
2	Young ICCA Webinar Emerging Jurisdictions	14 August 2020	https://www.arbitration-icca.org/YoungICCA/EventPages/Webinars2020/YoungICCA_webinar_14AUG2020.html	An online program on emerging jurisdictions that aims to educate members on what to develop within an emerging jurisdiction, as well as the membership and networking between jurisdictions.
3	9th Baltic Arbitration Days 2020	16 – 17 August 2020	http://www.balticarbitration.com/en/	A conference on arbitration in transport related disputes, arbitration and IT, third party funding, investment arbitration update and the impact of the pandemic.
4	Non-Contractual Claims in Commercial Arbitration	20 August 2020	https://siarb.org.sg/events/upcoming-events/icalrepeat.detail/2020/08/20/232/-/change-of-date-non-contractual-claims-in-commercial-arbitration-20-august-2020;	A virtual conference to educate members on the non-contractual claims in commercial arbitration (types, jurisdiction and governing law) and issues that arise in pleading non-contractual claims in commercial arbitration.
5	6th Annual GAR Live Singapore	01 September 2020	http://gar.live/singapore2020	An all-inclusive session that aims to discuss different topics ranging from investor state mediation and enforcement, determining the new normal with the pandemic, deliberations on the SIAC Rules and more.
6	The LCA International Arbitration Certificate Programmes (Beginners Class)	7 - 9 September 2020	https://www.lca.org.ng/training-school/	A virtual international arbitration certification course for students and individuals with little or no experience in international arbitration who desire to gain more knowledge on ADR/international arbitration.

UPCOMING ADR EVENTS

S/N	EVENT	DATE	WEBSITE	SUMMARY
7	The LCA International Arbitration Certificate Programmes (Construction Arbitration)	10 -11 September 2020	https://www.lca.org.ng/training-school/	A virtual tailored course on construction arbitration for registered participants of the LCA Training School and anyone desirous of gaining or advancing their knowledge in the area of construction arbitration.
8	The LCA International Arbitration Certificate Programmes (Master/Advanced Class)	14 -17 September 2020	https://www.lca.org.ng/training-school/	A virtual advanced certification training on international arbitration for graduates of the beginners class and professionals desirous of acquiring further knowledge in ADR/international arbitration.
9	Canada Arbitration Week	21–25 September 2020	https://canarbweek.org	A virtual conference to deliberate on the international and domestic future of arbitration in Canada.
10	15th ICC New York Conference on International Arbitration	22-23 September 2020	https://2go.iccwbo.org/icc-new-york-conference-on-international-arbitration.html	A conference geared at providing the latest developments in international arbitration from the perspective of arbitration experts.
11	Kigali International Arbitration Center (KIAC) 2020 Annual Conference	01-02 October 2020	https://kiac.org.rw/new/spip.php?article203	An international arbitration conference to examine the developments of international arbitration in Africa. The conference also aims to proffer expert contributions on the developments in trade and investment that will influence the future of international arbitration in Africa.
12	Australian Arbitration Week 2020	12 – 16 October 2020	https://acica.org.au/australian-arbitration-week/	A conference scheduled to discuss pertinent matters and procedural issues in arbitration.

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