

Choice of Arbitration Rules - The Dilemma of an African Adviser

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Choice of Arbitration Rules: The Dilemma of an African Adviser¹ *

Amissah, Austin Amissah** 21 March 1997

A. Introduction

In the midst of such a formidable and intimidating array of legal wisdom and expertise in arbitration, I venture to raise a simple question: by what criteria can a legal adviser, especially an adviser in Africa, decide on which of the arbitration rules to choose for the international commercial contract he is negotiating? The sponsorship of this conference includes at least three of the world's most prestigious institutions administering international commercial arbitration. The oldest of these institutions, the LCIA, has now established a Pan African Council. But the institution with the heaviest load of work is without doubt the ICC. ICSID deals with the narrower field of international investment disputes. UNCITRAL has no administration for arbitrations carried on under its Rules, although, the LCIA and the latest arbitration institution, the WIPO Arbitration Center, offer to rectify the deficiency by providing administration services for parties proceeding under the UNCITRAL Rules. The question posed involves the subsidiary question whether or not the choice of a particular set of Rules really matters. Does it matter whether the Rules adopted for the contract are the ICC, LCIA, ICSID, UNCITRAL, AAA, WIPO, or the other national Rules, like the Swedish Chamber of Commerce, which have gained international recognition? Does it matter whether the arbitration is held in London, Paris, Geneva, New York or Cairo or some other African country? With the increasing business and trade relations between developing countries, what should happen in the case of a South-South business relationship which has turned sour? Where should the aggrieved party turn for the implementation of the intended arbitration?

Most commercial agreements between North and South start with the initial draft coming from the Northern partner. If, as usually the case, arbitration is proposed as a means of settlement of disputes arising from them, the suggestion for the Rule choice and the venue of the arbitration is made in the original draft. If the draft contract is prepared by a lawyer conversant with the different Rules, the advice on the choice thus comes from him or her. It is not, however, certain that for the number of such commercial agreements, the original draft of the arbitration clause with its suggestion as to Rules and venue is well or informedly made. The Rules opted for may be anything from the Rules of the Chartered Institute of Arbitration of England and Wales to any of the known international commercial arbitration Rules. As demonstrated by the recent agreed policy statement on the respective areas of operation issued by the LCIA and the Chartered Institute in the LCIA Newsletter

¹* Paper presented to the Arbitration Conference jointly sponsored by: the Arbitration Association of South Africa; the International Chamber of Commerce; International Court of Arbitration; The London Court of International Arbitration; and the International Center for the Settlement of Investment Disputes (World Bank). Held in Johannesburg, South Africa, 6-8 March, 1997.

of October, 1996, strictly, the Chartered Institute is not supposed to deal generally with individual international disputes. The statement explains that, "The Chartered Institute is a learned society principally concerned with the education, training and qualification of arbitrators, with the promotion and study of arbitration in all its forms, with administration of arbitrations restricted to a limited number of domestic schemes; while the LCIA is an arbitral institution principally concerned with the administration of international arbitrations of all kinds, in London or elsewhere." From this, it would appear that reference to Rules of the Chartered Institute as governing disputes in an international agreement may be wrong and ill-informed.

In the North-South contract situation mentioned, whatever the choice of Rules or venue selected, once proposed by the North, the Southern partner usually accedes to the suggestion. The choice is often made at a time when the interest of the contractual partners is focused on the realisation of an objective through the agreement and not the contemplation of potential disputes arising from it. An African Government lawyer with considerable experience in the making of international contracts once frankly admitted that with contracts involving donor funds, the Government has practically no control over the determination of matters like the Rules of arbitration. The donor chooses and the Government lives with the choice. In cases where the Government could have a choice, said the lawyer, the legal advisers of Government involved, usually know so little about the differences in the available Rules that an informed choice is impossible. This comment must have a wider application than to Government legal advisers, because a large number of lawyers in private practice who choose arbitration as the dispute resolution mechanism in agreements they are helping to negotiate may never have read a book dedicated to arbitration. Besides, the fact that those who advise on the drawing up of agreements are not necessarily the same as the lawyers who actually deal with the arbitrations arising from those agreements makes redress of the deficiency in knowledge among the former group of lawyers a matter of some difficulty.

This paper says nothing new. What it does is to point out that the various Rules contain differences which may have different consequences for prospective users. The intention of the paper, therefore, is to question whether the differences are such as could influence an informed choice of Rules by legal advisers, and if so to help potential users to focus their minds on those issues in selecting or agreeing to the selection of any particular set of Rules for the international contract on which they are advising. Bearing in mind that the object of the arbitral process is to secure a just and fair result to a dispute at a reasonable cost, and that delays deny, or at least tarnish the administration of, justice as much in the arbitral process as it does in the adjudicative process, it is suggested that a look be taken at a few selected areas where the objective of the process can be achieved, and counter-vailing factors minimised. The areas selected relate to the appointment of the Tribunal; the venue, which would cover the procedural backstop that the courts of the jurisdiction do or could, if needed, provide, and the convenience of the parties in carrying on the arbitration there, especially its effect on costs; and the costs of the arbitration. In the course of the

discussion, other features peculiar to individual sets of Rules may be mentioned.

B. Comparison of Aspects of Rules

Institutional or Non-Administered Arbitration

The first major question to be determined in the selection of the governing arbitration rules is whether the parties prefer an administered or institutional arbitration to a non-administered or *ad hoc* arbitration. *Ad hoc* arbitration has the apparent attraction of avoiding the payment of the administrative fees which institutions charge. In the best of all possible worlds, it should from that point of view be cheaper than institutional arbitration. Some writers find further merit in *ad hoc* arbitrations. But others are quite passionate in their advice that the *ad hoc* arbitration should be avoided at all cost. Compare in this regard the comments of *Campbell & Summerfield: Effective Dispute Resolution for the International Commercial Lawyer*, with those of *Craig, Park & Paulsson on ICC Arbitration*. *Campbell & Summerfield* at page 13, says of the *ad hoc* proceedings that: "... it can generally be said that there is greater control over the dispute resolution process and the likelihood of a quicker result if *ad hoc* arbitration is used." The suggested gainers from the use of the *ad hoc* procedure are the parties. This view, however, is disputed by those who believe that with the *ad hoc* arbitration, problems of control of members of the Tribunal in the course of the hearing, e.g. inability of member(s) to participate at required times, may arise. There could also be delays in writing the award. In the case, for example, of a President who delays in the writing of his award where the other members have long submitted their input for it, how is the problem resolved? Without a supervisory body, there is apparently no one other than the Tribunal itself to complain to. A complaint to the Tribunal brings no joy. If the inordinate delay occurs at the end of the hearing, the suggestion that the parties may cause the removal of the defaulting President becomes impractical. In the first place, the parties may not agree on that remedy; besides considerable costs would without doubt be incurred in getting a substitute. Even where the Rules permit an award by two members of a Tribunal of three without the participation of the third member, an award in this situation may prove impractical where the remaining two disagree. And there are jurisdictions where less credibility is given to an award by two of a three-member Tribunal.

Craig, Park & Paulsson, in their vintage first edition on *International Chamber of Commerce Arbitration* paragraph. 4.03 said of *ad hoc* (non-administered) arbitration:

"parties should generally be cautioned *against* adopting *ad hoc* arbitration clauses in an international contract, no matter how well drafted.

In practice, once litigation ensues, agreements for *ad hoc* arbitration have created adversity (and in some cases disaster) for the claimant. It is impossible to foresee and provide for all the procedural issues which may come up. (In the case of institutional arbitration, such issues are handled by reference to a pre-established body of

rules). Moreover, every time the defendant creates delays, or fails to file pleadings or evidence, or refuses to participate in hearings, the claimant has an unattractive choice: A) to ask a judge to intervene, thus ending up in an ordinary court, which is exactly what one wanted to avoid by drafting the arbitration clause, or B) to ask the arbitrators to proceed by default, which will increase the risk that their award would be challenged by the losing party.

Whatever its merits in a purely domestic situation, the ad hoc arbitration clause in an international setting (where potential means of creating delays are innumerable) frequently frustrates the party seeking to enforce the contract.” 14

These remarks may probably apply with greater force to the type of *ad hoc* arbitration rules devised by the parties in the agreement for themselves and not to the situation where the parties agree to apply the UNCITRAL Rules which are accepted universally as a flexible formulation for non-administered international arbitrations. Its dangers seem to be pointed out in a more restrained manner in *Park, International Forum Selection* (1995) at p.70: 15

“*Ad hoc* arbitration may be problematic due to the lack of institutional oversight. The supervisory vacuum will often serve to delight a defendant wishing to drag its feet. Moreover, courts asked to enforce awards obtained by default in *ad hoc* arbitration may be more concerned that the defaulting party did in fact obtain proper notice of the proceedings than they would be if the award bears the imprimatur of an institution such as the International Chamber of Commerce, the London Court of International Arbitration or the American Arbitration Association.” 16

Those who desire the flexibility of the UNCITRAL Rules but at the same time want some institutional supervision over the activities of the tribunal are advised to choose one of the institutions which administer the UNCITRAL Rules. e.g. the LCIA. *A Users Guide to LCIA and UNCITRAL Administered Arbitrations*, describes the procedure the LCIA follows when administering an arbitration under the UNCITRAL Rules. The LCIA, however, is adamant in the application of one of its fundamental rules of appointment of arbitrators, namely, although parties are encouraged to nominate arbitrators, to agree on the Chairman of the tribunal, or to put forward suggested names, “the LCIA Court alone is empowered to make appointments”. [It] may refuse to appoint party nominees if it determines that they are not suitably qualified, independent or impartial.” 17

It seems that if one were to choose to proceed by the non-administered form of arbitration, the choice should be, not to draft ones own set of *ad hoc* rules for the occasion but, to choose the UNCITRAL Rules. Those Rules have proved their flexibility, adaptability and durability by their adoption, albeit with some modifications, for the Iran-U.S. Claims Tribunal. Otherwise, the recognised international Rules are many: the ICC Rules of Conciliation and Arbitration ('the ICC Rules'), the LCIA Rules of Arbitration ('the LCIA Rules'), the International Center for the Settlement of Investment Disputes Rules ('the ICSID Rules'), the American Arbitration Association Rules ('the AAA Rules'), the WIPO Arbitration Rules 18

('the WIPO Rules'), the Stockholm Chamber of Commerce Rules ('the SCC Rules'), etc. Having regard to the impracticability of looking at all of these institutions, the sponsorship of this Conference provides a convenient yardstick for the selection of the few Rules this paper will look at. With the exception of passing references to other institutions, this paper will confine itself to the ICC, LCIA and ICSID Rules and compare them from time to time with the UNCITRAL Rules.

Delays in the Appointment Procedure

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The appointing processes contain seeds for potential delay. If the choice is for the UNCITRAL non-administered arbitration, the appointment of the Arbitral Tribunal is primarily a matter for the parties. They may have agreed before-hand on a sole arbitrator, in which case, they have to identify the person. If the parties have not agreed on a sole arbitrator, the Rules unequivocally prescribe that there should be three arbitrators. If, on the other hand, the choice is for institutional arbitration by the ICC or LCIA, should the parties not have agreed on the number of arbitrators both Rules provide that a sole arbitrator will be appointed, unless the Court in each case is of the opinion that the matter is such as should be decided by three arbitrators. This of course has immediate cost consequences, because the costs of the arbitration will, if there are three arbitrators, be looking at fees for that number of arbitrators and not just for one. If the Tribunal is to be composed of three arbitrators, the usual form is for each of the parties to choose its own arbitrator, with the third and presiding arbitrator being chosen by the party appointed arbitrators. The parties should have agreed upon an appointing authority in case of failure to agree, otherwise the UNCITRAL Rules give them the freedom to select an institution or a person as appointing authority. If no appointing authority is agreed upon by the parties, or if the appointing authority agreed upon refuses or fails to appoint the arbitrator(s) within 60 days of the receipt of a party's request for the appointment of arbitrator(s), either party may request the Secretary-General of the Permanent Court of Arbitration at the Hague to designate an appointing authority. The fact that the Secretary-General himself does not appoint the arbitrator(s) but designates an appointing authority to do so, could result in delay in the process.

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In the case of institutional arbitrations, the role of the appointing authority of the UNCITRAL Rules is played by the respective Courts of the ICC and LCIA. The ICC appoints either the sole arbitrator, or the Chairman of a panel of three arbitrators, unless the parties have provided that the arbitrators nominated by them shall agree on the third arbitrator, in which case the Court must confirm the appointment of such agreed third arbitrator. But the Court will step in and appoint the arbitrator whenever there is default by a party in exercising its right to appoint an arbitrator, or where the parties do not agree on the third arbitrator within the specified time. When the ICC Court has to appoint an arbitrator, a special task of finding a suitable candidate is undertaken by National Committees in the ICC system. If the ICC wants to appoint someone of a particular nationality, it will contact the local Na-

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tional Committee to assure that the Committee finds the most suitable candidate. “The National Committee appointment procedure has also been criticised for causing delays in the constitution of the tribunal. Indeed, the time involved in determining which National Committee should make the proposal, communicating with the ... Committee, [its] search for a suitable candidate, and the appointment of that candidate by the ICC Court ... may be considerable in some cases.” [see *An Inside View of the ICC Court* Robert H. Smit, *Arbitration International*, 1994 Vol. 10, 53 at p.62]. If the Court itself makes an appointment, it will take into account several internal criteria, such as nationality, residence, other relationships, standing, and recommendations from the ICC National Committee. Normally, a sole arbitrator will have a nationality other than that of either of the parties.

The LCIA Court, on the other hand assumes responsibility for the appointment of all arbitrators operating under its Rules. As stated earlier, the parties are encouraged to nominate arbitrators, to agree the Chairman of a three-man tribunal, or to put forward suggested names. But the LCIA Court alone has the power to make the appointments, which is done on the Court's behalf by the President or one of the Vice-Presidents; the Court retains the right to refuse to appoint party nominees if it decides that they are not suitably qualified, independent or impartial. Thus, if the parties have agreed that they are to nominate arbitrators themselves or to allow two arbitrators, or a third party to nominate an arbitrator, the Court may refuse to appoint such nominees if they fail to meet the Court's criteria. Unlike the ICC, the LCIA does not operate a National Committee system. And although the LCIA does not publish panels of arbitrators, its *Users Guide* claims that it has extensive information on potential international arbitrators worldwide on whom it maintains up-to-date information with regard to qualifications, expertise and experience. This information is available to the President and Vice-Presidents when they make appointments. The LCIA further claims that appointments are usually made within a matter of days when the parties are ready, based on this knowledge or verified reputation of the appointee, after enquiries about availability and the level of fees chargeable.

In the case of ICSID the task of the appointing authority is performed by the Chairman of the Administrative Council.

Where an appointing authority has to make an appointment under the UNCITRAL Rules, it uses the list procedure, unless both parties agree that the procedure should not be used or the appointing authority decides in its discretion that the procedure is not appropriate for the case. The list-procedure may also be time-consuming, as it involves the sending back of the designated list to the parties for them to strike out those they do not want and to rearrange and return the list containing the remaining names to enable the appointing authority to make the appointment. The list-procedure set out in the UNCITRAL Rules has no equivalent under the ICC or LCIA Rules.

Requests, Statements of Claim and Terms of Reference

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Under the ICC and LCIA Rules, (ICC Art.2,4) and (LCIA Art. 1(e)), but unlike the UNCITRAL Rules, the Request for or Notice of Arbitration must include the nomination of an arbitrator, if the parties have agreed on a party appointment. This requirement should result in a considerable saving of time. Further, the ICC Rules require that the Statement of Claim should accompany the request for arbitration, which, undoubtedly, is a time-saving device. It avoids the time taken between the notification of or request for the arbitration, which in the case of the UNCITRAL Rules, must include the “general nature of the claim and an indication of the amount involved, if any”, and in the case of the LCIA Rules, includes or is accompanied by “a brief statement describing the nature and circumstances of the dispute, and specifying the relief claimed” on the one hand, and the later submission of the proper Statement of Claim. But whatever time may be saved under the ICC Rules, if not more, may be lost under its Terms of Reference procedure, which imposes upon the Tribunal the obligation at the outset to prepare a document defining the terms of reference covering a summary of the parties' respective claims; a 'definition' of the issues to be determined; and the particulars of the applicable procedural rules to be applied. The basic justification for this document is that it crystallises the issues and concentrates the minds of the arbitrators and other participants on the process. But critics of the procedure point to the time and expense that the process of drafting and executing the Terms of Reference entails, the absence of commensurate benefits derived from the process, and the occasionally inefficient or unfair application of the Rule (16) which requires that new claims or counter-claims must come within the limits fixed by the Terms of Reference. The type of document drafted to meet the requirement, if detailed, takes time to compose, but if sketchy, merely giving the Tribunal power in general terms to decide all issues raised on the claim, counter-claim and defences, or consists of a recitation of parts of these document, though time-saving is a waste of time.

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C. The Cost Factors

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Perhaps the most important single consideration in making a choice between the available Rules is the costs. What would the adoption of the particular set of Rules cost? This may be a hypothetical question at the time of making the contract; for a dispute may never arise. It is, however, necessary to assume the worst and to safeguard against it, if possible. As stated earlier, the non-administered arbitration carries no administration costs. Even that type involves some costs: the fees of the arbitrator(s); the fees of lawyers and agents, the cost of facilities, such as rooms for the arbitration, secretarial services, translation, if any. If the arbitration takes place in another country, transportation and hotel accommodation for the parties, their teams and witnesses must be considered. Some of these costs could be eliminated under certain Rules. For example, ICSID because of its connection with the World Bank, and the WIPO Arbitration Center, because of its connection with WIPO,

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and because of the nature of their respective jurisdictions, make facilities available to the parties which parties would not otherwise get under other arbitral procedures. *Craig, Park & Paulsson* (2nd ed.) at page 39 state that, “for large cases, ICSID arbitration is probably less expensive than ICC arbitration, primarily because the parties stand to benefit from the World Bank’s infrastructure, and because arbitrators’ fees are calculated on a per day basis.” [emphasis supplied] The emphasis is here given because the view is taken by the authors in another context that the charge of fees on a time basis is not necessarily better than the percentage of the amount-in-dispute basis used by the ICC.

The Venue

Venue by itself is not such an important factor for determining the question of choice from the various recognised Rules, because each of the institutions as well as UNCITRAL says that proceedings could be taken under its Rules anywhere in the world. The venue has importance when considering the arbitral environment in which proceedings under whichever set of Rules chosen can be taken. Above all the venue has relevance when considering the impact that the arbitration law of the jurisdiction would have on the procedures of the Tribunal; the degree of control or powers of intervention which the courts of the jurisdiction would have; the judicial assistance they could give by way of interim relief and otherwise, the appellate or review powers over awards and the enforcement of the award etc. The comment in the *LCIA Worldwide Arbitration Newsletter* Vol. 1 No.2 of October 1996 on the English Arbitration Act is in this respect of interest. It says:

“A major criticism of London arbitration continues to be the access to the court for review. The right to challenge an award used to be based on the ground of ‘misconduct’ and has given rise to many applications based on the procedure used in an arbitration. Challenge now has to be made on the ground of ‘serious irregularity’ which should have the effect of reducing the number of applications (section 68).

Although the rights of review and appeal from the Tribunal’s award have been severely limited, they have not been eliminated entirely by the English legislation. But as stated earlier, the substantive law of the venue on arbitration, does not make that much difference to the choice of any of the recognised Rules for regulating the arbitration. The differences in the Rules on venue may, however, be of interest, because of the different answers they give to the question regarding the choice of the place where the arbitration should be held, if the parties themselves were to fail to name a venue. The UNCITRAL Rules in the event of default by the parties leave the choice of the place of arbitration to the Tribunal, having regard to the circumstances of the arbitration. But the Tribunal is given power to hear witnesses and hold meetings and consultation among its members at any place the Tribunal deems appropriate. The ICC Rules leave it to the ICC Court if the parties fail to agree. No reference is made to the Court having regard to the circumstances or the exigencies of the situation which would lead it to select one place rather than the other. Nor

do the ICC Rules contain provisions similar to the UNCITRAL provisions on the discretion of the Tribunal to hold hearings, consultations and inspections somewhere else. The LCIA Rules specifically name London as the place of arbitration in the absence of a choice by the parties, unless the Tribunal determines that in view of all the circumstances, and after having given the parties an opportunity to make comments in writing, that another place is more appropriate. This formulation of the Rules gives power apparently to the Tribunal to overrule the choice of the parties. Under the proposed new LCIA Rules, the Tribunal is to be substituted by the Court. The commentary on the draft explains that the proposed formulation “eliminates the curious possibility that arbitrators who were named for a particular place of arbitration can decide to go elsewhere.” The LCIA Rules also explicitly allow the Tribunal to hold hearings and meetings elsewhere. Both the ICC and LCIA Rules provide that the award shall be deemed to have been made in the place of arbitration.

The point made here is that in a default situation the parties are at the mercy of the Tribunal, in the case of an arbitration under the UNCITRAL Rules; at the mercy of the Court in the case of the ICC Rules; and when the new LCIA Rules come into force, the parties must come to London, unless the Court decides otherwise. The determination of the place of arbitration also has an impact on the costs and convenience of access of the parties. In an article I wrote in *Arbitration International* (Vol. 8 No.2, 1992 at page 167) on “The ACP/EEC Conciliation and Arbitration Rules”, I raised the issue of the concern of ACP States over the logistical disadvantage they suffer in arbitrations with their EU treaty-partners held in Europe. The comparative costs of transportation of advisers and witnesses, the transmission of documents, stay at hotels, communications, especially the seeking of instructions, between arbitral venue and the home-base, all put the ACP parties at a disadvantage. From that point of view, in the present context, the question arises whether London, Paris, Geneva or New York is the most convenient or cost-effective place for an arbitration between an African party and a party from outside the continent. With the development of intra-African trade, the question could be further refined into whether any of these venues should be used for arbitrations between parties resident in Africa. At the last LCIA Pan-African Council Conference in Nairobi in December 1994, Jan Paulsson gave the 7 Freedoms the absence of which continue to make Africa an unattractive destination for international arbitration as the freedom:

- “1. to choose arbitration as the method of dispute resolution; because leaving a discretion in the hands of the courts whether to enforce an international agreement to arbitrate is not acceptable; 34
2. to be represented at the arbitration proceedings by counsel of one's choice; 35
3. to stipulate the language or languages to be used in the arbitration proceedings; 36
4. to have the dispute decided by arbitrators selected by the parties; 37
5. to have the arbitration proceedings conducted in the manner agreed between the parties; 38

6. to have the dispute determined according to whichever law or other basis is chosen by the parties; 39

7. to secure an award which is final and binding and not subject to review or amendment by another body.” 40

With the development of centres for arbitration in Cairo and Harare and the adoption of clones of the UNCITRAL Model Law by Nigeria, Egypt, Kenya and Zimbabwe, and now with the possibility of South Africa joining the group, the answer to the question whether at least intra-African arbitrations should be held outside Africa, should increasingly become weighted towards the negative. The development deserves all encouragement from this Conference. 41

The Administrative Costs 42

The non-administered arbitration is supposed to avoid institutional fees. But as pointed out by *Craig, Park & Paulsson* (2nd ed. at page 39) “*ad hoc* proceedings arranged outside an institutional framework often turn out to be frighteningly expensive. The parties think they avoid administrative expenses, but in point of fact the tribunal they set up must create its own *sui generis* administration.” Whatever the effective position, if even administrative costs are avoided, under the UNCITRAL Rules, (Art.38(f)), “fees and expenses of the appointing authority as well as the expenses of the Secretary General of the Permanent Court of Arbitration at the Hague” if any, would have to be paid by the parties. 43

Institutions like the ICC and LCIA charge for the cost of administration. Their approaches to the calculation of these costs are different. Apart from what it describes as administrative costs, the LCIA charges a registration fee, presently set at £1,000 which is non-refundable. No such charge is made by the ICC. While the ICC bases its administration charges on the amount in dispute, the LCIA, and indeed the AAA, base theirs on the time spent on the administration. This makes comparison difficult, and the comparison is rendered even more complicated by the fact that the currencies in which the institutions charge are different, the ICC, the AAA and the WIPO Center charging in US dollars while the LCIA's charges are in pounds sterling. It is, however, not impossible to imagine scenarios in which one approach would result in much higher costs than the other. According to the ICC Scale of Administrative Expenses, the amounts payable to cover costs for a few selected claim-amounts of, for example, \$500,000, \$1 million or \$10 million, which are all modest sums by present day international commercial standards, but nevertheless still quite substantial by African standards, are as follows (with the expense figure in brackets against each claim figure): for a claim for \$500,000 (\$9,500); for \$1 million (\$14,500); \$10 million (\$30,500). On any amount above \$10 million up to \$80 million, the expenses amount to \$30,500 plus 0.05% of the amount exceeding \$10 million. On any amount over \$80 million the expense fee is a flat \$65,500. To arrive at the figure for the amount involved in the dispute, the claim amount is added to the amount of the counter-claim, unless the 44

ICC Court takes the view that the counter-claim amount is so disproportionate to that of the claim that different charges ought to be set for the respective claims. The approach of a percentage charge based on the amount in dispute gives no recognition to the degree of complexity of the work involved in the particular case.

Apart from the flat non-refundable registration charge of £1,000, the LCIA's administrative charges, on the other hand, are calculated on the basis of time actually spent, with a charge of £150 per hour for the time of the Registrar or Deputy-Registrar, and £75 per hour for that of the Secretariat. Where the administrative services rendered in connection with an arbitration are not time-intensive, this method of calculation must be more cost-effective.

Fees of the Arbitrator(s)

With regard to the fees of the Tribunal, in the case of an *ad hoc* proceeding, the arbitrator(s) would have to negotiate their entitlement with the parties. If the proceedings are under the UNCITRAL Rules, the Tribunal in fixing its fees is obliged to take into account any schedule of fees which has been issued by an agreed or designated appointing authority "to the extent that [the Tribunal] considers appropriate in the circumstances of the case". If the appointing authority has not issued a schedule of fees in international cases, a party may request the authority to furnish a statement setting out a basis for the establishment of fees which is customarily followed in international cases in which the authority appoints arbitrators. If so furnished, the Tribunal is obliged to take the statement into account "to the extent that it considers appropriate in the circumstances of the case." In these cases, when a party requests and the appointing authority consents to perform the function, the Tribunal must fix its fees after consultation with the appointing authority, which is entitled to make any comments it deems appropriate to the Tribunal.

The fees of the arbitrators under the ICC Rules are charged according to the amount in dispute; the Scale of Fees specifying a minimum and maximum figures within which the Court would fix the arbitrator(s) fees. Taking the same figures in dispute as for the administrative expenses, the fees for an arbitrator are, for \$500,000 (minimum of \$5,950 and maximum of \$32,500); for \$1 million (minimum: \$8,450; maximum: \$47,500); for \$10 million (minimum: \$22,450 and maximum: \$121,500). The fees progress on a diminishing percentage basis as the amount in dispute increases. *Craig, Park & Paulsson* (2nd ed., at pages 40 - 41) refer to the potential windfall receipts inherent in this system for lawyers, giving as an example, a large case which was settled some years ago, before any issue had been argued, but after a day-long meeting to draft the Terms of Reference. "Even after partial refund of the deposit, each arbitrator was given a fee of some \$40,000." As the learned authors commented, "This kind of jackpot approach has no place in international commercial arbitration, it corresponds more to the image of the occasionally lucky business 'finder' than to that of a reputable profession." I cannot say that this situation can never

occur again. If it cannot, the mechanisms put in place to prevent such recurrence would be of interest.

The LCIA calculates the fees of the arbitrators according to the hours spent by them on the arbitration. According to the Schedule of Costs effective from 1 June 1996, the fee rates must be within the following bands: Time for meetings or hearings: £600-£2,000 per full working day. Other time spent on the arbitration: £100-£250 per hour. In exceptional cases, the rates may be higher or lower if agreed expressly by all parties. Neither the LCIA nor the ICC permits private agreements between any nominee or arbitrator and his nominator for the fixing or payment of fees or expenses. In practice, the LCIA sets arbitrator(s)' fees according to the rates of the selected arbitrators. With a view to greater control over the cost-element, the proposed LCIA Rules suggest that the provisions on the constitution of the Tribunal should include in addition the following: "If the parties have agreed that they are to nominate arbitrators, or a third party to nominate an arbitrator, such arbitrator or arbitrators shall be appointed subject to their agreement upon fee rates proposed by the Registrar in conformity with the Schedule of Costs." (see Art.5.3) The commentary to this change, points out that: "The LCIA strives to give users a cost-effective solution. Occasionally it has been impeded by arbitrators demanding egregiously high fees. The added phrase in Article 5.3 is designed to assist in dealing with such situations." The current Article 18 places the responsibility for the computation of costs on the Tribunal. The proposed new Rules transfers this responsibility to the Court. The commentary on this amendment (to be found in the new Art. 24) says that its intention is to 'remove arbitrators' power to fix their own fees. There have been occasional difficulties in this respect. Better practices (record-keeping, prior understandings) should follow automatically when arbitrators realise they must convince the Registrar.'

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Security for Costs

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The various Rules import the adoption of different methods for ensuring the payment of the costs by the parties to the arbitration. UNCITRAL arbitrators and other non-administered Tribunals have to organise their own system of deposits for securing payment. The institutional costs-structure covers the administrative costs and the costs of the Tribunal. Under the ICC Rules, each request to open an arbitration must be accompanied by an advance payment of US\$2,000 on the administrative expenses. This payment is not recoverable and becomes the property of the ICC, and is credited to the portion of the administrative expenses payable by the party. No request for arbitration will be entertained unless accompanied by the appropriate payment. The Court has power to set different costs figures for the parties. This may happen, for example, where there is a counter-claim by the defendant which is higher than the claim. The Court, having set the figures will request each of the parties to pay an amount corresponding to 25% of the total estimated costs in advance, amounting to 50% of these costs in equal shares. Before July 1986, although the Court had power to request the payment of a portion of the costs as advance, in practice, it

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requested payment of the whole amount, i.e., each of two parties paying 50% of the costs, or in default by the respondent, the claimant paying the total amount, before the arbitration could proceed. Since then, the introduction of the system of 'staggered' payments means that the initial advance has been reduced to 25% in cash. From that same date, bank guarantees have been acceptable to the Court, but now only when one party has fully paid 50% or a minimum of \$300,000 in cash as advance on the costs. The ICC Secretariat will, therefore, not accept an offer of a guarantee either to make up the default of the other party on its initial 25%, nor to secure the remaining 50% if each party paid its required 25% share at the outset. The problem created by the new procedure is described by *Craig, Park & Paulsson* in their 2nd edition of their book at page 249 as follows:

“Under the prior system, the claimant was in greater control of the progress of the arbitral proceedings. Having initiated arbitral proceedings by filing a Request for Arbitration, the claimant could, by then paying in 50% of the entire advance as soon as the amount was fixed by the Court of Arbitration, assure that the proceedings would advance, and that the file would be transmitted rapidly to the arbitrators. 52

Under the present procedure, the need to wait for payment by the defendant, (or notice that the defendant will not comply with his payment obligation), introduces an element of uncertainty and delay. Weeks or months may go by before the situation is resolved. During this time the file remains with the ICC Secretariat,” 53

The passage was written before the January 1993 changes introduced the \$300,000 minimum advance payment. It should be mentioned that all the initial advance payment of a portion of the estimated costs does is to move the arbitration to the stage of the preparation of the Terms of Reference. After that, there will be no further movement until the entire amount of the estimated costs has been paid in. 54

Under the LCIA Rules, on the other hand, the Tribunal may order the parties to deposit with the LCIA an amount sufficient to cover the Tribunal's fees and expenses and the LCIA administrative costs for the next stage of the arbitration. The time limit for the staged deposits will vary with the circumstances, but meetings and hearings will not commence if the amount ordered has not been deposited. 55

The LCIA makes the point that a separate account is opened for each arbitration. Moneys deposited are placed in a special deposit account and the interest accruing remains with the account and is credited to the amount deposited by the parties. Similarly the WIPO Arbitration Center's services make it clear that “Interest accruing on deposits administered by the Center is credited to the parties.” This is not the course adopted by the ICC. *Craig, Park and Paulsson on ICC Arbitration* (1st ed) made the point in paragraph 3.03 that: 56

“interests from deposits made by parties are not credited to them - a practice difficult to justify - and have become an important source of revenue for the ICC. As a result, parties to ICC arbitration subsidize ICC operations which have nothing to do with 57

arbitration. Or to put it another way, profits of ICC arbitration are not used for the sole purpose of upgrading arbitration services.”

The 2nd edition of the book waters down the criticism considerably, and in the true *audi alteram partem* spirit puts forward the justification for the approach given by the ICC. The case of the ICC basically being that the administrative costs charged are not sufficient in themselves to cover the ICC's costs, and that far from the arbitration process involving a limited number of people with files in the office, it is linked to the ICC as a whole, in the performance of its diverse functions. The fact remains that other institutions manage to do without the retention of the interest on the deposits, which in the case of the ICC amounts to a very considerable sum. 58

D. Conclusion 59

This paper is not intended as a criticism of any particular set of Rules. It is an invitation for a discussion, not only now, but on an on-going basis, on the advantages and disadvantages of the various Rules. Comparing the advantages or disadvantages of the different Rules may be an unrewarding task. Much more study needs to be done of the subject. The differences in the approaches of the institutions make the task of comparison even more difficult. Estimating the relative potential costs of an arbitration at the time of making a contract in order to determine which set of Rules to choose cannot in any case be easy. That should not prevent the comparative study. We are warned that complaining that a type of arbitration is expensive is meaningless in the abstract. That may be. In that case, the study should include the examination of specified similar scenarios which would allow meaningful comparison of the various Rules. 60

With the institutions, there must be certain matters on which the choice of Rules cannot make much difference. There is every likelihood that each of them is in a position to select good arbitrators. There is equally the possibility that occasionally each of them may choose an arbitrator who is not up to the mark. All of them must be striving to achieve a just and fair resolution of disputes at reasonable cost. Complex cases arise from time to time; but it cannot be the nature of the arbitral process that all cases are, *ex hypothesi*, complex. Perhaps after consideration a possible conclusion may be that one set of Rules is better suited to a particular type of arbitration than the other. Possibly by consideration of various factors, a preferred position could be taken of one out of the available sets of Rules. Perhaps this paper has omitted to mention important criteria by which the services provided under the various Rules should be judged. One such omission drawn to my attention during the earlier part of the Conference was that I had omitted to refer to the services provided by each of the institutions for the money it charges. To this I readily plead guilty, but offer by way of explanation the plea that this paper was not intended as a comprehensive study of the differences between the institutions which could contribute to the selection process. Other omissions will, no doubt be supplied in the course of the 61

discussion. What is feared, and what this paper seeks to caution our African advisers particularly to avoid, is the making of a choice in ignorance of, or without regard to, the options available. To remove or minimise this danger, a way must be found of making any results emerging from the discussion available to the general body of legal advisers called upon to advise on the drawing up of contracts. It may be that after considering all the factors, the adviser will come to the conclusion that the choice of a particular set of Rules in preference to others does not matter any way. But that will be a conscious choice made out of knowledge and not from the lack of it.

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